SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 861.

THE UNITED STATES, APPELLANT,

vs.

THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE AND THE CITY OF LOUISVILLE.

APPEAL FROM THE COURT OF CLAIMS.

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1. In the Court of Claims, Term 1895–1896.

THE COMMISSIONERS OF THE SINKING FUND OF the City of Louisville and the City of Louisville, Kentucky,
vs.
THE UNITED STATES.
18315.

I.—*Petition.*—*Filed March 14, 1894.*

To the Honorable the Judges of said Court:

Your petitioners say that they are both corporations organized and existing under the laws of the State of Kentucky and that they have power to sue and be sued, and they respectfully represent:

1. That said city of Louisville during the period from October 1, 1862, to July 6, 1872, was the owner and holder of a large amount of the stock and bonds of the Louisville and Nashville Railroad Company; that during said period of time there accrued to said city dividends upon the stock of said railroad company and also a large amount of interest upon the bonds and securities of said railroad company so owned and held by said city of Louisville. And said city being the owner of the stock and bonds of said company and also its proportionate share of the surplus earnings of said company, was entitled to the full use, profit, and advantage of the same and all the interest accruing thereon, without any deduction or diminution thereof.

2 2. Said dividends, interest, and moneys so accruing and belonging to the said city of Louisville were not the proper subjects of taxation under the internal-revenue laws of the United States.

3. Yet notwithstanding such immunity from taxation, the United States by its officers and agents, between the first day of October, 1862, and the fifth day of July, 1872, under the act of June 30, 1864, and other internal-revenue laws, made an assessment upon the aforesaid dividends, interest, and money, belonging to said city of Louisville at the rate of three per cent upon some portions, five per cent upon other portions, and two and one-half per cent upon other portions thereof, and the said assessment was collected and the amount thereof deducted and withheld from the dividends, interest, and moneys due and payable to the city and its board of sinking fund commissioners, and the revenues of the city were lessened to that extent.

4. Said internal-revenue taxes so illegally assessed and collected amounted to the sum of thirty-four thousand six hundred and sixty-seven dollars and eighty cents ($34,667.80).

5. On the twenty-fifth day of February, 1893, the Congress of the United States passed an act entitled "an Act for the benefit of the State of Kentucky, Logan and Simpson counties, and of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee," by which it was provided that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, was authorized and required to audit and adjust the claims of the sinking fund commissioners of the State of Kentucky, of Logan and Simpson counties in said State, of the city of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee, for

internal-revenue taxes collected on railroad dividends, on stock, and on interest on railroad bonds owned by said counties and city, respectively, in the Louisville and Nashville Railroad Company, and of said State, for internal-revenue taxes collected, and interest on railroad bonds of the railroad from Louisville to Lexington, on dividends on stock of said
3 railroads owned by said State, counties, and city, to the extent that such taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded, and for this purpose any statute of limitations to the contrary notwithstanding, sections 989, 3220, 3226, 3227, and 3228 of the United States Revised Statutes are made applicable and available with the force and effect as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts when ascertained, as aforesaid, and not heretofore refunded, shall be paid out of the permanent annual appropriations provided for similar claims allowed within the present fiscal year. A copy of said statute is hereto appended.

6. Afterwards, to wit, on the day of May, 1893, your petitioners appealed to the Commissioner of Internal Revenue for a refunding of said sum of $34,667.80, the amount of the tax so as aforesaid illegally assessed and collected, and the said Commissioner upon full consideration decided and held that said taxes were illegally assessed and collected, and that there should be refunded to the petitioners the sum of thirty-one thousand three hundred and fifty-nine dollars and two cents ($31,359.02), and thereupon, upon the 26th day of September, 1893, the Hon. Geo. W. Wilson, Acting Commissioner of Internal Revenue, addressed a letter to the Secretary of the Treasury setting forth his decision and recommending that said sum of $31,359.02 be refunded. On the 6th day of October, 1893, Hon. C. S. Hamlin, Acting Secretary of the Treasury, having carefully examined and considered the subject, approved the action and recommendation of the Commissioner of Internal Revenue.

On the 7th day of October, 1893, the Acting Commissioner of Internal Revenue ordered said money to be refunded to the petitioners, and issued his certificate and schedule No. 1403 properly signed, allowing said claim for the sum of $31,359.02, all of which will more fully appear by
4 reference to said certificate and schedule, a copy of which is hereto appended and make part of this petition.

Copies of the letters of the Acting Commissioner of Internal Revenue and the Acting Secretary of the Treasury hereinbefore referred to are also appended to this petition.

8. No assignment or transfer of said claims or any part thereof or interest therein has been made, and the said city of Louisville and your petitioners, the sinking fund commissioners of said city, representing said city, are the owners, and entitled to the full amount of said sum of thirty-one thousand three hundred and fifty-nine dollars and two cents ($31,359.02) from the United States, after allowing all just credits and offsets.

Your petitioners have demanded that the amount so certified and allowed be paid in due course of office; but there has been paid only the sum of thirteen thousand seven hundred and twenty-five dollars and fifty-nine cents ($13,725.59), and all other or further payments have been refused. There is still due on the amount allowed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury the sum of sev-

enteen thousand six hundred and thirty-three dollars and forty-three cents ($17,633.43), for which payment has been refused, though often requested. Petitioners therefore demand judgment against the United States for said sum of seventeen thousand six hundred and thirty-three dollars and forty-three cents.

FONTAINE T. FOX,
Att'y for Board of Sinking Fund Commissioners of the City of Louisville, Ky., and the City of Louisville.

THE STATE OF KENTUCKY, *City of Louisville:*

Chas. H. Gibson, president of the board of the sinking fund commissioners of the city of Louisville and State of Kentucky, being duly sworn, on oath says that no assignment or transfer of the claim mentioned and set forth in the foregoing petition or any part thereof or any interest therein has been made; that the petitioners are justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets, and he believes the facts stated in said petition are true.

CHAS. H. GIBSON,
President of the Board of Sinking Fund Com'rs of the City of Louisville.

Subscribed and sworn to before me this 5th day of March, A. D. 1894.

[SEAL.] GEORGE R. LOCHER,
Notary Public, Jefferson County, Kentucky.

Commission expires January 11, 1896.

E. H. B. [Copy.] C. H. I.

[Enclosure.]

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., September 26, 1893.

Hon. J. G. CARLISLE, *Secretary of the Treasury.*

SIR: I have the honor to transmit herewith for your consideration, advisement, and approval the claim of the sinking fund commissioners of the city of Louisville, Kentucky, for the refunding of thirty-four thousand six hundred and sixty-seven dollars and eighty cents ($34,667.80), tax alleged to be due and payable to the said city under the provisions of the act of Congress (Public, No. 91) approved February 25, 1893, entitled "An act for the benefit of the State of Kentucky, Logan and Simpson counties, and of Louisville, Kentucky," etc.

Among other things, the act directs the refunding to the city of Louisville of "internal revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said * * * city * * * in the Louisville and Nashville Railroad Company * * * to the extent that such taxes were deducted from any dividends or interest due and payable * * * and which have not been heretofore refunded."

The tax claimed was collected on the surplus afterwards converted into dividends on stocks and on interest on bonds of the Louisville and Nash-

ville Railroad Company held by the city of Louisville between October 1, 1862, and July 5, 1872. The total amount so withheld from said city on account of tax on the coupons of said bonds is found to be thirty-one thousand six hundred and fifty-nine dollars and forty cents ($31,659.40), and the total share of taxes on dividends and surplus borne by the city is found to be forty-two thousand two hundred and thirteen dollars and fifty-seven cents ($42,213.57), making an aggregate of seventy-three thousand eight hundred and seventy-two dollars and ninety-seven cents ($73,872.97). Of this aggregate the sum of forty-two thousand five hundred and thirteen dollars and ninety-five cents ($42,513.95) has been refunded (see Fifth Auditor's Report, No. 58114), which leaves
6 thirty-one thousand three hundred and fifty-nine dollars and two cents ($31,359.02) to be refunded. I propose to allow the claim for this amount.

Respectfully, yours,
(Signed) G. W. WILSON,
Acting Commissioner.

9482A.
28-EK.

[Copy.]

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., October 6, 1893.

COMMISSIONER INTERNAL REVENUE.

SIR: With your letter of the 26th ultimo, you submitted "for the consideration, advisement, and approval" of the Secretary, the claim of the sinking fund commissioners of the city of Louisville, Kentucky, for the refunding, under section 3220, R. S., of $34,667.80, tax alleged to be due and payable to the said city under the provisions of the act of February 25, 1893 (27 Stat., 477), for the benefit of the State of Kentucky, * * * Louisville, &c., directing, among other things, the refunding to the city of Louisville of "internal-revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said * * * city * * * in the Louisville and Nashville Railroad Company, * * * to the extent that such taxes were deducted from any dividends or interest due and payable * * * and which have not been heretofore refunded."

You find that the sum of thirty-one thousand three hundred and fifty-nine dollars and two cents ($31,359.02) was withheld by said Louisville and Nashville Railroad Company on interest on bonds of said company, owned by the city of Louisville, between October 1, 1862, and July 5, 1872, and paid to the United States under the provisions of section 122 of the act of June 30, 1864, and you propose to allow said amount ($31,359.02).

Your allowance is hereby approved and the claim is herewith returned.

Respectfully, yours,
(Signed) C. S. HAMLIN,
Acting Secretary.

L. J. C.

E. H. B. No. 1403. R. T. H.

A schedule of claims for the refunding of taxes which have been examined and allowed.

Dist.	Claimants.	Amount.
5th Ky.	Sinking fund commissioners of the city of Louisville, Kentucky	$31,359.02
	Sinking fund commissioners of Logan County, Kentucky	15,397.75
	Sinking fund commissioners of Simpson County, Kentucky	1,296.02
	Total	$48,052.79

I hereby certify that the foregoing claims for refunding of taxes erroneously assessed and paid have been examined and allowed.

G. W. WILSON,
Acting Commissioner of Internal Revenue.

OFFICE OF INTERNAL REVENUE,
October 7, 1893.

7 II.—*Amendment to petition filed by leave of court March 28, 1895.*

To the Honorable the Judges of said Court:

Your petitioners, by leave of the court first had and obtained, file this their amendment to their original petition:

At the end of said petition add the following additional count or paragraph:

Your petitioners further say, and making reference to the statements contained in the first count of their petition, that in their application to the Commissioner of Internal Revenue for the refunding of the sum of $31,359.02 they made demand for interest upon the amount so illegally collected from them, which said claim for interest was disallowed, and they aver that there is justly due and owing to them interest upon the aforesaid sum of thirty-one thousand three hundred and fifty-nine and $\frac{2}{100}$ dollars, at the rate of six per cent per annum, from the 6th day of July, 1872.

No assignment or transfer of said claim or any part thereof, or any intent therein has been made, and the said commissioners of the sinking fund of the city of Louisville and the city of Louisville are the owners, and entitled to the full amount of said claim for interest, and they therefore demand judgment for the amount of said interest from the date last aforesaid to March 1st, 1894, on $31,359.02, and on $17,633.43 since that time.

FONTAINE T. FOX,
Attorney for Claimants.

THE STATE OF KENTUCKY,
City of Louisville.

Chas. H. Gibson, president of the board of sinking fund commissioners of the city of Louisville and State of Kentucky, being duly sworn, on oath says that no assignment or transfer of the claim mentioned and set forth in the foregoing amendment to the petition in this case, or any part thereof, or any interest therein, have been made; that the petitioners are

justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets, and he believes the facts stated in the foregoing amendment to the petition are true.

CHAS. H. GIBSON.

Sworn to and subscribed before me this 25th March, 1895.

[SEAL.] WILLIAM T. HALL,
Notary Public, Jefferson County, Kentucky.

Commission expires January 11, 1896.

8 III.—*Traverse.—Filed November 12, 1895.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

9 IV.—*Findings of fact and conclusion of law.—Filed December 2, 1895.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

Between October 1, 1862, and July 6, 1872, the city of Louisville, Ky., owned a large amount of the stock and bonds of the Louisville and Nashville Railroad Company. The company paid the interest on its bonds and cash dividends on its stock from time to time, retaining, however, in each of the years 1865 to 1871, inclusive, an undistributed surplus. Under the internal-revenue laws in force during that period the said company paid taxes to the United States upon its gross receipts, its undistributed surplus, the interest payable on its bonds, and its cash dividends. The taxes paid on interest and dividends were deducted from the amounts due as interest and dividends, so that the revenues of the city of Louisville accruing from these sources were diminished to the extent of such deduction, but such deduction was not known to the sinking fund commissioners of the city until the time had expired for an application for a refund of the taxes so deducted.

II.

On November 16, 1867, the directors of the said company resolved to make an increase of its capital stock to the extent of 40 per cent, the same to be distributed among the owners of stock in proportion to the amounts

owned by them on a certain date, by certificates of stock to be issued therefor after February 10, 1868. The city of Louisville received in 1868 certificates for its due proportion of the said increase of stock.

On October 6, 1880, the directors of the said company resolved to increase its capital stock 100 per cent, such increase to be distributed among the owners of stock and stock liabilities in proportion to the amount owned by them on a certain date, by certificates of paid-up stock to be issued after December 1, 1880. The city of Louisville, having continued to hold the stock of the said company, received in 1881 certificates for its due proportion of the said increase of stock.

10

III.

On March 10, 1890, the board of the commissioners of the sinking fund of Louisville, Ky., presented a petition to the Committee on Claims of the House of Representatives, stating that the city of Louisville had owned stock in the Louisville and Nashville Railroad Company; that dividends had been declared from time to time on the said stock, which dividends had become due and payable to the said board, and that taxes had been levied upon such dividends as stated in Finding I. The petition asked favorable consideration of a bill which had been introduced to require a refund of these taxes, but made no mention of any other taxes than such as had been levied upon "dividends due and made payable" only.

IV.

Under the act of June 16, 1890 (26 Stat. L., 157), the city of Louisville and the sinking fund commissioners of the said city applied for a refund of $65,578.32 on account of taxes claimed to have been illegally exacted of the said city through the Louisville and Nashville Railroad, which amount was stated, in a schedule annexed to the claim, as being composed of the following items:

1. Dividends (distributed)	$24,801.14
2. Dividends (undistributed or surplus)	21,721.29
3. Interest on bonds owned by city	815.30
4. Gross receipts	18,240.59
Total tax due	65,578.32

Evidence was presented of the 40 per cent increase in the stock of the railroad company in 1867–68, mentioned in the second finding, but it does not appear that any evidence as to the 100 per cent increase of stock in 1880 was presented at that time.

V.

This claim was duly audited and adjusted by the Commissioner of Internal Revenue, who allowed $24,801.14 on account of taxes paid by the Louisville and Nashville Railroad Company on dividends paid to the city of Louisville, and $17,712.89 on account of taxes paid in 1865, 1866, and 1867 by the said railroad company on its undistributed surplus, the said sum of $17,712.89 being proportioned to the amount of stock issued to the city of Louisville out of the 40 per cent stock dividend above men-

tioned. He refused to allow the claim on account of taxes paid on gross receipts and on interest and so much of the claim on account of taxes on undistributed surplus as concerned the taxes levied in 1868, 1869, 1870, and 1871. The action of the Commissioner was approved by the Secretary of the Treasury, and when the claim reached the First Comptroller, through the Fifth Auditor, the correctness of the finding was not questioned, but the Comptroller reported that there was no appropriation out of which payment could be made.

11 The following papers show more specifically the action of the Commissioner, Auditor, and Comptroller:

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, D. C., January 24, 1891.

Hon. WILLIAM WINDOM,
Secretary of the Treasury.

SIR: I have the honor to submit herewith, for your consideration and advisement, the claim of the sinking fund commissioners of the city of Louisville, in the State of Kentucky, for the refunding of taxes collected from the Louisville and Nashville Railroad Company to the amount of $65,578.32.

The taxes were collected prior to 1873, and the claim was filed in September, 1890.

The claim is therefore barred except so far as the act of June 16, 1890 (Public, No. 157), authorizes the adjustment of it. That act directs the adjustment of this claim "to the extent that such taxes were deducted from any dividends due and payable," and does not direct the adjustment of the claim to the extent that taxes were deducted from interest or gross receipts.

I have, therefore, only to consider the amount deducted from dividends accruing to the city of Louisville by virtue of its shares of stock in the railroad company.

The tax on dividends was paid by the railroad company under the provisions of section 122 of the act of June 30, 1864.

So far as this tax was deducted from dividends accruing to the city of Louisville, it was unlawfully deducted and paid over to the United States. (See decision of the U. S. Supreme Court in the case of United States v. Railroad Company, 17 Wall., 322.)

The amount so deducted from the share of dividends to which the city of Louisville was entitled is found to be $42,514.03, which embraces the sum of $24,801.14 collected on cash dividends and $17,712.89 collected as tax on surplus profits, which were afterwards set apart by resolution of the board of directors of the railroad company as the basis of a stock dividend which was declared in 1868.

I propose to allow the claim for the sum of $42,514.03.

Respectfully, yours,

JOHN W. MASON, *Commissioner.*

TREASURY DEPARTMENT, FIFTH AUDITOR'S OFFICE,
February 3d, 1891.

I hereby certify that I have examined and adjusted an account between the United States and the Comm'r of Int. Rev. and find that the sum of

forty-two thousand five hundred thirteen $\frac{95}{100}$ dollars is due from the United States, as follows, viz:

For the refunding of taxes, deducted from dividends on shares of stock in the Louisville and Nashville Railroad Co. Schedule No. 1317. Private act app'd June 16, '90.

Payable to the board of the sinking fund commissioners of the city of Louisville, Ky.

Care of Comm'r Int. Rev., 5th district, Ky.

Pay out of the appropriation for the relief of the board of comm'rs of the sinking fund of the city of Louisville, Ky., app'd June 16, '90, as appears from account and vouchers herewith transmitted for decision of the First Comptroller of the Treasury thereon.

J. L. TUCKER,
Acting Auditor.

$42,513.95.

To the FIRST COMPTROLLER OF THE TREASURY.

TREASURY DEPARTMENT, FIRST COMPTROLLER'S OFFICE,
March 7, 1891.

I admit and certify that a balance of forty-two thousand five hundred fourteen and $\frac{03}{100}$ dollars is due and payable as stated in the above report. Pay out of the appropriation for "payment to city of Louisville, Ky." Deficiency act approved March 3, 1891.

A. C. MATTHEWS,
First Comptroller.
By I. R. GARRISON,
Deputy First Comptroller.

12 VI.

The two items allowed amounted to $42,514.03. This amount was reported to Congress by the Secretary of the Treasury February 14, 1891, as having been found due under the act of June 16, 1890, and as having remained unpaid for lack of an appropriation, but no statement of the items of the claim made or those composing the amount allowed appears to have been made to Congress. Subsequently the sum of $42,514.03, appropriated by the act of March 3, 1891 (26 Stat. L., 854, 857), was paid to the city of Louisville.

The following are the communications by which the refund of the Commissioner of Internal Revenue was transmitted to Congress:

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
Washington, D. C., February 14, 1891.

SIR: Referring to an act for the relief of the board of commissioners of the sinking fund of the city of Louisville, Ky., approved June 16, 1890 (25 Stat., p. 157), which directed the audit and adjustment of the claim of said board of commissioners for internal-revenue taxes, etc., I have the honor to inclose copy of a report made by the First Comptroller in the case, of this date, showing that the sum of $42,514.03 is found due the claimants.

As there is no appropriation available for the payment of the claim, the sum found due as shown by the Comptroller's letter is respectfully submitted for the action of Congress.

Respectfully, yours,

A. B. NETTLETON,
Acting Secretary.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

TREASURY DEPARTMENT, FIRST COMPTROLLER'S OFFICE,
Washington, February 14, 1891.

SIR: The letter of Senator Blackburn, in regard to the claim of the sinking-fund commissioners of the city of Louisville, Ky., is respectfully returned with the remark that the act for the relief of the claimant was passed by the Fifty-first Congress at the first session, on the 16th of June, 1890. It directed the Secretary of the Treasury and the Commissioner of Internal Revenue to audit and adjust the claim, which they have done, finding the amount of $42,514.03 due the claimant, the correctness of which finding is not questioned by this office. In due course, on the 4th instant, this claim, so adjusted, reached this office for payment. The act requiring the audit and adjustment does not carry an appropriation for the payment of the amount to the claimant, nor can it be paid out of the permanent annual appropriation, under section 3689, Revised Statutes.

As the present Congress has had this matter under consideration, and referred it for adjustment, I see no impropriety in reporting it at once for an appropriation.

Very respectfully,

A. C. MATTHEWS,
Comptroller.

Hon. A. B. NETTLETON,
Acting Secretary of the Treasury.

VII.

Under the act of February 25, 1893 (27 Stat. L., 477), the city of Louisville and the sinking-fund commissioners applied for a refund of $34,667.80 on account of taxes claimed to have been illegally
13 exacted, which amount was stated in a schedule annexed to the claim as being composed of certain items described in the claim, as follows:

United States of America, Dr., to commissioners of the sinking fund of the city of Louisville and the city of Louisville.

To internal-revenue tax on undistributed dividends or surplus (which was afterwards, to wit, in April, 1881, reduced or converted into a scrip or stock dividend) collected as follows:

Oct. 31, 1868	$1,304.20
Nov. 30, 1869	529.15
Jan. 10, 1871	829.25
Nov. 10, 1871	345.80
Total amount	3,008.40

FINAL SUMMARY.

1. Am't collected on interest on bonds, supra	$31,659.40
2. Am't collected on surplus or undistributed dividends	3,008.40
Entire total	34,667.80

Evidence was presented of the 100 per cent increase in the stock of the railroad company in 1880, mentioned in the second finding. The claim for the amounts stated to have been collected from the railroad company on account of taxes levied upon its undistributed surplus in 1868 to 1871 (amounting to $3,008.40 in all) had been included in the claim presented in 1890, but, as stated in the fifth finding, had not been allowed.

VIII.

The Acting Commissioner of Internal Revenue audited and adjusted this claim, and as incidental to such audit and adjustment he reexamined the claim allowed in 1891. He allowed the entire claim on account of taxes on interest on bonds ($31,659.40), and also that on account of taxes on surplus, which he found to amount to $3,248.51, making a total gross allowance of $34,907.91. In consequence of the reexamination of the allowance of 1891, out of the sixteen items then allowed on account of taxes on dividends, eight were decreased, five were increased, and three were not changed, the aggregate result being a reduction of $221.34, or from $24,801.14 to $24,579.80. The allowance of 1891 on account of taxes on surplus was reduced by $3,327.55, or from $17,712.81 to $14,385.26, making a total reduction on both branches of the allowance of 1891 of $3,548.89, which being subtracted from $34,907.91 allowed left a net allowance of $31,359.02.

The Acting Commissioner reported to the Secretary of the Treasury as follows in regard to the claims of 1891 and 1893, treated as one:

"The total amount so withheld from said city [Louisville] on account of tax on the coupons of said bonds is found to be thirty-one thousand six hundred and fifty-nine dollars and forty cents ($31,659.40), and the total share of taxes on dividends and surplus borne by the city is found to be forty-two thousand two hundred and thirteen dollars and fifty-seven cents ($42,213.57), making an aggregate of seventy-three thousand eight hundred and seventy-two dollars and ninety-seven cents ($73,872.97). Of this aggregate the sum of forty-two thousand five hundred and thirteen dollars and ninety-five cents ($42,513.95) has been refunded (see Fifth Auditor's report No. 58114), which leaves thirty-one thousand three hundred and fifty-nine dollars and two cents ($31,359.02) to be refunded. I propose to allow the claim for this amount."

14

IX.

The balance so allowed, having been approved by the Acting Secretary, was certified by the Fifth Auditor to the First Comptroller, who deducted therefrom the sum of $17,633.85, leaving a balance of $13,725.17, for which sum he directed a draft to be issued to the city of Louisville. The amount so deducted ($17,633.85) was made up as follows:

Amount allowed and paid in 1891 for taxes on surplus	$17,712.89
Excess paid in 1891 for taxes on cash dividends	221.34
Total erroneous allowance paid in 1891	17,934.23
Net amount deducted by Commissioner (for errors in 1891) from allowance for taxes on interest	300.38
Balance of erroneous allowance to be deducted	17,633.85

And upon the foregoing findings of fact the court decides, as conclusion of law, the claimants should recover seventeen thousand six hundred and thirty-three dollars and forty-three cents ($17,633.43).

V.—*Opinion of the court.*

NOTT, J., delivered the opinion of the court:

A number of points were presented and ably argued on the hearing of this case, but in the opinion of the court it turns and must be decided upon only one of them.

The action is to recover an unpaid balance of a refund of internal-revenue taxes allowed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury. Such an allowance is an award, and upon it an action may be maintained in this court. (United States v. Kaufman, 96 U. S. R., 567, affirming decision in 11 C. Cls. R., 659.) Such an award is conclusive unless impeached, and the burden of impeaching it is upon the defendants. In this case they have not sought to do so.

The defense is in fact, though not in form, by way of set-off, and goes only to a portion of the demand. That is to say, the amount set up by way of set-off is less than the amount of the award.

The facts which present the point to be determined are practically embodied in two acts of Congress. In 1890 a statute was passed authorizing the Secretary of the Treasury and the Commissioner of Internal Revenue to adjust the claim of the city of Louisville for a refund of "taxes on dividends on shares of stock" which the city owned in the Louisville and Nashville Railroad. The Secretary and Commissioner made a refund in which they allowed the city $24,801.14 on account of taxes paid on cash dividends and $17,712.89 on account of taxes paid on "undistributed surplus," or profits of the road, the whole amounting to $42,514.03. Subsequently Congress, by the Deficiency Act, 30th of June, 1891 (26 Stat. L., pp. 862, 867), made the following appropriation:

"Payment to the city of Louisville, Kentucky: For payment to the city of Louisville, Kentucky, the amount found due, under act of Congress approved June sixteenth, eighteen hundred and ninety, and reported to Congress in House Executive Document numbered two hundred and sixty of the present session, forty-two thousand five hundred and fourteen dollars and three cents."

The defendants insist that the allowance by the Commissioner of Internal Revenue of the amount of $17,712.80 on account of taxes paid on stock dividends was erroneous and unauthorized by the act of 1890, and that the subsequent act 25th of February, 1893 (27 Stat. L., p. 477), has reopened the matter, so that the erroneous allowance of the Commissioner can be set off against the unquestioned award which is the subject of the suit.

This act of 1893, like the act of 1890, authorizes and requires the Commissioner of Internal Revenue to audit and adjust claims of the city of Louisville and of certain counties in Kentucky for internal-revenue taxes on dividends declared by the Louisville and Nashville Railroad Company.

It also directs that this shall be done notwithstanding "any statute of limitations to the contrary;" and it finally directs that "the amounts when ascertained, as aforesaid, and not heretofore refunded, shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year."

If Congress intended to make the remedy granted by this statute conditional upon the reexamination of the claim previously adjudicated and paid under the acts of 1890–1891, there should have been a provision signifying such an intent. If it had provided that the Secretary and Commissioner, or the accounting officers of the Treasury, might reexamine the award that had then been made and satisfied, and deduct any erroneous overpayment from any amount which might be allowed on the claims which might be allowed under the act of 1893, the claimant by seeking relief under the statute would be deemed to have agreed to the prescribed condition. But the statute as it stands expresses no intent to disturb what has been done, and no such intent can be read into it where there is no such implication. The question, therefore, is whether the refund of taxes, if made by the Commissioner of Internal Revenue in excess of his statutory authority, can be recovered back after it has been paid under and by the express authority of an act of Congress.

It is the opinion of the court that money paid to a designated person by authority of a specific appropriation of Congress can not be recovered back because of subsequently discovered mistake of fact or error of law. The Supreme Court said in United States v. Jordan (113 U. S. R., pp. 418, 422, and sec. 19, C. Cls. R., 108):

"The Court of Claims held that the statute did not admit of that interpretation, nor leave open any question for the court or for the accounting officers of the Treasury except the identity of the claimants with the persons named in it; and that its language, taken together, was too clear to admit of doubt that Congress undertook, as it had a right to do, to determine not only what particular citizens of Tennessee by name should have relief, but also the exact amount which should be paid to each one of them. We concur in this view."

The language is authoritative to this court and decisive of the present case. The judgment of the court is that the claimant recover the amount withheld by the accounting officers from the award made under the act of 1893, to wit, the sum of $17,633.43.

16 VI.—*Judgment of the court.*

At a Court of Claims held in the city of Washington on the second day of December, A. D. 1895, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find for the claimants, and do order, adjudge, and decree that the said The Commissioners of the Sinking Fund of the City of Louisville and The City of Louisville, Kentucky, do have and recover of and from the United States the sum of seventeen thousand six hundred and thirty-three dollars and forty-three cents ($17,633.43).

BY THE COURT.

17 VII.—*Application of defendants for and allowance of appeal.*

THE COMMISSIONERS OF THE SINKING FUND OF the City of Louisville and The City of Louisville, Kentucky,
v.
THE UNITED STATES. } No. 18315.

From the judgment rendered in the above-entitled cause, on the 2nd day of December, 1895, in favor of the claimants, the defendants, by their Attorney-General, on the 21st day of December, 1895, make application for and give notice of an appeal to the Supreme Court of the United States.

J. E. DODGE,
Asst. Atty. General.

Filed December 21, 1895.

Allowed in open court January 13, 1896.

WILLIAM A. RICHARDSON,
Chief Justice.

18 In the Court of Claims.

THE COMMISSIONERS OF THE SINKING FUND OF the City of Louisville and The City of Louisville, Kentucky,
vs.
THE UNITED STATES. } No. 18315.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of the defendants for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 17th day of January, 1896.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 16151. Term No., 861. The United States, appellant vs. The Commissioners of the Sinking Fund of the City of Louisville and The City of Louisville. Court of Claims. Filed January 18, 1896.

(16,274.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 167.

THE COMMISSIONERS OF THE SINKING FUND OF LOGAN COUNTY AND THE COUNTY OF LOGAN, KENTUCKY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 22, 1897.

1 In the Court of Claims.

THE COMMISSIONERS OF SINKING FUND OF LOGAN COUNTY and THE COUNTY OF LOGAN, KENTUCKY,
vs.
THE UNITED STATES. } 18316.

I.—*Petition. Filed March* 14, 1894.

To the honorable the judges of said court:

Your petitioners state that they are both corporations organized and existing under and by virtue of the law of the State of Kentucky, and they respectfully represent:

1. That said County of Logan during the period from October 1, 1862, to July 6, 1872, was the owner and holder of a large amount of the stock of the Louisville and Nashville Railroad Company, upon which said stock dividends were declared, and moneys became payable to said county, and to its sinking fund commissioners. The said county was the owner of the dividends so declared, and of its share of the surplus earnings of the said railroad company, afterwards converted into stock certificates, and was entitled to the full use, profit, and advantage of the same without any diminution or deduction.

2. Said dividends, moneys, and stock certificates, so belonging to Logan county, were not the proper subject of taxation under the internal revenue laws of the United States.

3. Yet, notwithstanding such immunity from taxation, the
2 United States, by its officers and agents, between the first day of October, 1862, and the fifth day of July, 1872, under the act of June 30, 1864, and other internal revenue laws, made an assessment upon the aforesaid dividends, stock certificates, and moneys belonging and payable to said county and its commissioners, at the rate of three per cent. upon some portions, five per cent. upon other portions, and two and one-half per cent. upon other portions of said dividends, certificates, and moneys so belonging to said county, and the amount of the assessments so made was deducted from dividends and other moneys, payable to said county and to its sinking fund commissioners, so that the revenues of said county were lessened to that extent.

4. Said internal revenue taxes so illegally assessed and collected, amounted to the sum of seventeen thousand six hundred and six dollars and fourteen cents ($17,606.14).

5. On the 25th day of February, 1893, the Congress of the United States passed an act entitled "An act for the benefit of the State of Kentucky, Logan and Simpson counties, and of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee, by which it was provided that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, was authorized and required to audit and adjust the claims of the sinking fund com-

missioners of the State of Kentucky, of Logan and Simpson counties in said State, of the city of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee, for internal revenue taxes collected on railroad dividends, on stock, and on interest on railroad bonds owned by said counties and city, respectively, in the Louisville and Nashville Railroad Company, and of said State, for internal revenue taxes collected, and interest on railroad bonds of the railroad from Louisville to Lexington, on dividends on stock of said railroads owned by said State, counties and city, to the extent that such taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded, and for this purpose, any statute of lim-
3 itation to the contrary notwithstanding, sections 989, 3220, 3226, 3227 and 3228 of the United States Revised Statutes are made applicable and available with the force and effect as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts when ascertained, as aforesaid, and not heretofore refunded, shall be paid out of the permanent annual appropriations provided for similar claims allowed within the present fiscal year. A copy of said statute is hereby appended.

6. Afterward, to wit, on the — day of May, 1893, your petitioners appealed to the Commissioner of Internal Revenue for a refunding of said sum of seventeen thousand six hundred and six dollars and fourteen cents ($17,606.14), the amount of the taxes so as aforesaid illegally assessed and collected, and said Commissioner upon consideration, decided and held, that said taxes were illegally collected and ought to be refunded to the amount of fifteen thousand three hundred and ninety-seven dollars and seventy-five cents ($15,397.75), and thereupon on the 28th day of September, 1893, Hon. Geo. W. Wilson, acting Commissioner of Internal Revenue, addressed a letter to the honorable Secretary of the Treasury, setting forth his decision, and recommended to the Secretary that said sum of fifteen thousand three hundred and ninety-seven dollars and seventy-five cents be refunded.

On the 6th day of October, 1893, the Hon. C. S. Hamlin, acting Secretary of the Treasury, having examined and considered the action of the Commissioner of Internal Revenue, aforesaid, then and there approved of the same.

7. On the 7th day of October, 1893, Geo. W. Wilson, acting Commissioner of Internal Revenue, ordered said sum of fifteen thousand three hundred and ninety-seven dollars and seventy-five cents to be refunded to the petitioners and issued his certificate and schedule, properly signed, allowing said claim, all of which will more fully appear by reference to said certificate, and Schedule No. 1403, which is hereto appended, and made part of this petition.

4 Copies of the letters of the acting Commissioner of Internal Revenue and the acting Secretary of the Treasury hereinbefore referred to are also appended to this petition.

No assignment or transfer of said claims or any part thereof or interest therein has been made, and the said County of Logan, and

your petitioners, the sinking fund commissioner of said county representing said county, are the owners and entitled to the full amount of said sum of $15,397.75 from the United States after allowing all just credits and offsets.

Your petitioners have demanded that the amount so certified and allowed be paid in due course of office; but there has been paid only the sum of nine thousand five hundred and thirty-three dollars and fifty-four cents, and all other or further payments have been refused. There is still due on the amount allowed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, the sum of five thousand eight hundred and sixty-four dollars and twenty-one cents ($5,864.21), for which payment has been refused, though often requested. Petitioners therefore demand judgment against the United States for said sum of five thousand eight hundred and sixty-four dollars and twenty-one cents.

FONTAINE T. FOX,
Attorney for Board of Sinking Fund Commissioners of Logan County, Ky.

THE STATE OF KENTUCKY, }
Logan County. }

Thos. B. Harrison, chairman of the special board of sinking fund commissioners of Logan county, being duly sworn, on oath says that no assignment or transfer of the claim mentioned and set forth in the foregoing petition or any part thereof or any interest therein has been made; that the petitioners are justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets and he believes the facts stated in said petition are true.

THOS. B. HARRISON,
Chairman of Special Board of S. F. Com'rs of Logan Co., Ky.

Subscribed and sworn to before me this 5th day of March, A. D. 1894.

J. CAP. MORTON,
[SEAL.] *Notary Public, Logan Co., Ky.*

My commission expires July 15, 1894.

5 (Copy.)

E. H. B. Enclosure. S. N.
C. H. I.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
WASHINGTON, D. C., *September* 28, 1893.

Hon. J. G. Carlisle, Secretary of the Treasury.

SIR: I have the honor to transmit herewith for your consideration, advisement, and approval, the claim of Logan County and of the sinking fund commissioners of Logan county, Kentucky, for the refunding of seventeen thousand six hundred and six dollars and

fourteen cents ($17,606.14), tax alleged to be due and payable to the said county, under the provisions of the act of Congress (public, No. 91) approved February 25, 1893, entitled "An act for the benefit of the State of Kentucky, Logan and Simpson counties, and of Louisville, Kentucky, &c."

Among other things the act directs the refunding to Logan County, and the board of sinking fund commissioners of said county of "internal-revenue taxes collected on railroad dividends, on stock owned by said * * * county * * * in the Louisville and Nashville Railroad Company * * * to the extent that such taxes were deducted from any dividends * * * due and payable to the said board * * * and which have not been heretofore refunded."

The tax claim was collected on the dividends and the surplus afterwards converted into dividends on stocks of the Louisville and Nashville Railroad Company held by Logan County, Kentucky, between October 1, 1862, and July 5, 1872. The total amount withheld from said county on account of tax on dividend on stock is found to be nine thousand five hundred and thirty-three dollars and fifty-four cents ($9,533.54) and the total share of taxes on surplus borne by said county, is found to be five thousand eight hundred and sixty-four dollars and twenty-one cents ($5,864.21), making an aggregate of fifteen thousand three hundred and ninety-seven dollars and seventy-five cents ($15,397.75).

I propose to allow the claim for this amount.

Respectfully yours,

(Signed) G. W. WILSON,
Acting Commissioner.

(Copy.)

9494A.
28–EK.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *October* 6, 1893.

To the Commissioner of Internal Revenue.

SIR: With your letter of the 28th ultimo you submitted "for the consideration, advisement, and approval of the Secretary, the claim of Logan County and the sinking fund commissioners of Logan county, Kentucky, for the refunding, under section 3220 R. S., of $17,606.14 internal-revenue tax alleged to be due and payable to the said county under the provisions of the act of February
6 25, 1893 (27 Stat., 477), directing the refunding to said county of "internal revenue taxes collected on railroad dividends on stock owned by said * * * county and the board of sinking fund commissioners of said county, * * * in the Louisville and Nashville Railroad Company * * * to the extent that such taxes were deducted from any dividends * * * due and payable to said board * * * and which have not been heretofore refunded."

You find that the sum of $15,397.75 was withheld by said Louisville and Nashville railroad as follows: $9,533.54 on account of tax on dividends on stocks of said railroad company held by Logan County, and $5,864.21 on account of tax on the surplus afterwards converted into dividends on stocks in said company held by said county.

Your allowance is hereby approved, and the claim is herewith returned.

Respectfully yours,
(Signed) C. S. HAMLIN,
Acting Secretary.

L. J. C.

E. H. B. R. T. H.

No. 1403.

A Schedule of Claims for the Refunding of Taxes which have been Examined and Allowed.

Dist.	Claimants.	Amount.
5th Ky.	Sinking fund commissioners of the city of Louisville, Kentucky	$31,359 02
	Sinking fund commissioners of Logan county, Kentucky	15,397 75
	Sinking fund commissioners of Simpson county, Kentucky	1,296 02
	Total	$48,052 79

I hereby certify that the foregoing claims for refunding of taxes erroneously assessed and paid have been examined and allowed.

G. W. WILSON,
Acting Commissioner of Internal Revenue.

Office of Internal Revenue, October 7, 1893.

7 II.—*Amendment to Petition. Filed by Leave of Court April 1, 1895.*

To the honorable judges of said court:

Your petitioners, by leave of the court first had and obtained, file this their amendment to their original petition, as follows:

At the end of said petition add the following additional count or paragraph:

2d. Your petitioners further say that in their application to the Commissioner of Internal Revenue for the refunding of the sum of

$15,397.75, mentioned in the first count or paragraph of their petition, and to which petition reference is here made, they made demand for interest upon the amount so illegally collected from them, which said claim for interest was disallowed, and they aver that there is justly due and owing to them interest upon the aforesaid sum of fifteen thousand three hundred and ninety-seven and $\frac{75}{100}$ dollars, at the rate of six per cent., from the 6th day of July, 1872. No assignment or transfer of said claim or any part thereof or interest therein has been made, and the said County of Logan and your petitioners, the Sinking Fund Commissioners, representing said county, are the owners, and entitled to the full amount of said claim for interest, and they therefore demand judgment for the amount of said interest from the date last aforesaid.

FONTAINE T. FOX,
Attorney for Claimants.

THE STATE OF KENTUCKY, }
County of Logan, } *ss:*

Thos. B. Harrison, chairman of the special board of sinking fund commissioners of Logan county, being duly sworn, on oath says that no assignment or transfer of the claim mentioned and set forth in the foregoing amendment to the petition or any part thereof or any interest therein has been made; that the petitioners are justly entitled to the amount therein claimed from the United States after allowing all *past* credits and offsets, and he believes the facts stated in said amendment to said petition are true.

THOS. B. HARRISON,
[SEAL.] *Chairman Special Board of Sinking Fund Commissioners of Logan County.*

Subscribed and sworn to before me this 26th day of March, 1895, by Thos. B. Harrison, chairman aforesaid.

M. B. MORTON,
Clerk of Logan County Court.

8 III.—*Traverse. Filed November* 12, 1895.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney General.

9 IV.—*Findings of Fact and Conclusion of Law. Filed December 2, 1895.*

Findings of fact.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

Between October 1, 1862, and July 6, 1872, the County of Logan, Ky., owned some of the stock of the Louisville and Nashville Railroad Company, upon which stock the company paid cash dividends from time to time, retaining, however, in each of the years 1865 to 1871, inclusive, an undistributed surplus. Under the internal-revenue laws in force during that period the company paid taxes to the United States upon its dividends and upon its surplus earnings, the taxes on the former being deducted from the amount which would otherwise have been paid in full to the stockholders, but such deduction was not known to the sinking fund commissioners of the county until the time had expired for an application for a refund of the taxes so deducted.

The following is one of the returns made by the railroad company, and all were in substantially the same form:

Capital.	Net gains since prior dividend.	Rate of dividend declared.	Amount of dividend declared.	95 per cent. of dividend, being the whole amount paid to stockholders, etc.	5 per cent. of dividend retained as excise tax.
$5,527,870 63	$1,718,068 01	4 per cent. and tax.	$232,752 44	$221,114 82	$11,637 62
Profits over dividend declared, $1,485,315.57, 5 per cent. of which is..					74,265 78

II.

On November 16, 1867, the directors of the said company resolved to make an increase of its capital stock to the extent of 40 per cent., the same to be distributed among the owners of stock in proportion to the amounts owned by them on a certain date, by certificates of stock to be issued therefor after February 10, 1868. The County of Logan received in 1868 certificates for its due proportion of said increase of stock.

10 The following is the resolution by virtue of which the stock dividend was declared and distributed:

1867, Nov. 16. Resolved, that an increase of the stock of forty per cent. be made, the same to be distributed among the owners of stock in proportion to the amounts owed by them at the next closing of the books for the transfer of stock, by certificates of stock to be issued by the company for whole and fractional shares as the same may be due to each, and to be issued after the 10th of February, 1868, and whenever the net annual earnings of the company shall be sufficient to pay the interest accruing upon the indebtedness of the company, provide a sinking fund sufficient to pay the bonded debt of the company as it falls due and to pay 6 per cent. on the stock so increased by said 40 per cent. and upon 10 per cent. additional stock, there shall be a further increase of stock of 10 per cent., to be distributed as aforesaid, and in like manner there shall be additional distributions of stock at the rate of 10 per cent. from time to time as the net annual earnings of the company shall be sufficient to pay the interest on the indebtedness of the company, provide a sinking fund as aforesaid, and six per cent. on the stock so increased until the stock shall amount to ten million of dollars, and such increase of stock from time to time as aforesaid shall be charged on the books of the company to profit and loss account.

At the time when the stock dividend was declared, November 16, 1867, the nominal or par value of the capital stock of the Louisville and Nashville Railroad Company was $5,638,600.

The surplus earnings of the road, reported by the officers thereof to the Internal Revenue Department, prior to the year 1868, on which the road paid a tax of five per cent.—

Amounted in the aggregate to.....	$2,461,787 17
Tax paid thereon	123,089 36
	$2,338,697 81

The par value of the stock dividend in 1867 was $2,131,500.00.

III.

Under the act of February 25, 1893 (27 Stat. L., 477), the County of Logan presented a claim to the Commissioner of Internal Revenue for a refund of $17,606.14, which amount was made up as follows:

Tax on cash dividends.....	$9,645 47
Tax on surplus prior to 1868.....	6,747 89
Tax on surplus, 1868 and subsequently.....	1,212 78
Total.....	17,606 14

It appearing that the county had sold, May 3, 1879, all its stock in the Louisville and Nashville Railroad Company, the claim for taxes on surplus profits in 1868, and thereafter was subsequently withdrawn.

IV.

The Commissioner of Internal Revenue, on the 28th day of September, 1893, addressed a letter to the Secretary of the Treasury recommending the allowance of said sum, and asking his approval. On the 6th day of October, 1893, the Secretary of the Treasury approved this action and recommendation of the Commissioner, and on the 7th day of October, 1893, it was formerly scheduled and allowed by the Commissioner of Internal Revenue, of which notice was given to the proper officers of the Treasury Department. The schedule so made out and the papers in the case were referred to the Fifth Auditor of the Treasury and passed and approved by him. They then went before the Comptroller, and he refused to issue a warrant for the amount or direct the payment of the same, holding that the allowance of the claim for taxes paid on account of stock dividends was illegal and unauthorized. He thereupon directed the payment of $9,533.54, and refused to pay any other or further sum. This suit is brought to recover the sum of $5,864.21, which was rejected by the Comptroller and which he refuses to pay.

The letter of the Commissioner of Internal Revenue and the approval of the Secretary of the Treasury are those annexed to and forming part of the petition in this case.

11

V.

Prior to the passage of the act 25th February, 1893, the following proceedings had taken place in the Treasury Department relative to the same taxes paid by the same company:

During the period from October 1, 1862, to July 6, 1872, the city of Louisville, Ky., was the owner of a large amount of the stock and bonds of the Louisville and Nashville Railroad Company. Cash dividends were declared upon this stock. There was also a large amount of undistributed surplus belonging to the city, upon which stock or scrip dividends were issued to the city. These cash dividends and the undistributed surplus which was converted into stock or scrip dividends were held by the officers of the government to be subject to taxation, and taxes were assessed and collected according to the terms of the statute in force at the time of the respective collections. The taxes were paid by the railroad company, and the amounts so paid were deducted by the company from the sums due and payable to the city of Louisville—that is to say, before paying over dividends, the taxes were taken out, and the city received the dividends diminished by the amount of the taxes so paid, and its revenues were lessened to that extent.

On the 25th day of September, 1890, the sinking fund commissioners of the city of Louisville made application, under the act 16th June, 1890, for the refunding of taxes in the following amounts:

For tax on gross receipts	$18,240 59
For tax on cash dividends	24,801 14
For tax on undistributed surplus or stock dividends	21,721 29
For interest	815 30

On these claims the Commissioner of Internal Revenue allowed the following refund, which was approved by the Secretary of the Treasury:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
WASHINGTON, D. C., *January* 24, 1891.

Hon. William Windom, Secretary of the Treasury.

SIR: I have the honor to submit herewith for your consideration and advisement the claim of the sinking fund commissioners of the city of Louisville, in the State of Kentucky, for the refunding of taxes collected from the Louisville and Nashville Railroad Company to the amount of $65,578.32.

The taxes were collected prior to 1873, and the claim was filed in September, 1890.

The claim is therefore barred, except so far as the act of June 16, 1890 (public, No. 157), authorizes the adjustment of it. That act directs the adjustment of this claim "to the extent that such taxes were deducted from any dividends due and payable," and does not direct the adjustment of the claim to the extent that taxes were deducted from interest or gross receipts.

I have, therefore, only to consider the amount deducted from dividends accruing to the city of Louisville by virtue of its shares of stock in the railroad company.

The tax on dividends was paid by the railroad company under the provisions of section 122 of the act of June 30, 1864.

So far as this tax was deducted from dividends accruing to the city of Louisville it was unlawfully deducted and paid over to the United States. (See decision of the U. S. Supreme Court in the case of United States *v.* Railroad Company, 17 Wall., 322.)

The amount so deducted from the share of dividends to which the city of Louisville was entitled is found to be $42,514.03, which embraces the sum of $24,801.14 collected on cash dividends and $17,712.89 collected as tax on surplus profits, which were afterward set apart by resolution of the board of directors of the railroad company as the basis of a stock dividend which was declared in 1868.

I propose to allow the claim for the sum of $42,514.03.

Respectfully yours, JOHN W. MASON,
Commissioner.

On the 14th day of February, 1891, the claims so allowed were submitted to Congress by the following correspondence:

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *February* 14, 1891.

SIR: Referring to an act for the relief of the board of commissioners of the sinking fund of the city of Louisville, Ky., approved June 16, 1890 (26 Stat., p. 157), which directed the audit and adjustment of the claim of said board of commissioners for internal-revenue taxes, etc., I have the honor to inclose copy

of a report made by the First Comptroller in the case, of this date, showing that the sum of $42,514.03 is found due the claimants.

As there is no appropriation available for the payment of the claim, the sum found due as shown by the comptroller's letter is respectfully submitted for the action of Congress.

Respectfully yours, A. B. NETTLETON,
Acting Secretary.

The Speaker of the House of Representatives.

TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
WASHINGTON, *February* 14, 1891.

SIR: The letter of Senator Blackburn, in regard to the claim of the sinking fund commissioners of the city of Louisville, Ky., is respectfully returned with the remark that the act for the relief of the claimant was passed by the Fifty-first Congress at the first session, on the 16th of June, 1890. It directed the Secretary of the Treasury and the Commissioner of Internal Revenue to audit and adjust the claim, which they have done, finding the amount of $42,514.03 due the claimant, the correctness of which finding is not questioned by this office. In due course, on the 4th instant, this claim, so adjusted, reached this office for payment. The act requiring the audit and adjustment does not carry an appropriation for the payment of the amount to the claimant, nor can it be paid out of the permanent annual appropriation, under section 3689, Revised Statutes.

As the present Congress has had this matter under consideration, and referred it for adjustment, I see no impropriety in reporting it at once for an appropriation.

Very respectfully, A. C. MATTHEWS,
Comptroller.

Hon. A. B. Nettleton, acting Secretary of the Treasury.

Under the provision of the deficiency appropriation act, 30th June, 1891 (26 Stat. L., p. 867), "For payment to the city of Louisville, Kentucky, the amount found due under the act of Congress approved June 16, 1890, and reported to Congress in House Executive Document No. 260 of the present session, $42,514.03," the money was paid to the city by the proper officers of the Treasury Department.

Conclusion of Law.

And upon the foregoing findings of fact the court decides as a conclusion of law:

The petition of the claimants should be dismissed.

V.—*Opinion of the Court.*

NOTT, J., delivered the opinion of the court:

Between October 1, 1862, and November 16, 1867, the Louisville and Nashville Railroad Company made certain returns to the Commissioner of Internal Revenue under the act 30th June, 1864 (13 Stat. L., p. 223), showing the dividends declared and "profits over dividend declared" which had been made by the company. The following is one of these returns:

Capital.	Net gains since prior dividend.	Rate of dividend declared.	Amount of dividend declared.	95 per cent. of dividend, being the whole amount paid to stockholders, etc.	5 per cent. of dividend retained as excise tax.
$5,527,870 63	$1,718,068 01	4 per cent. and tax.	$232,752 44	$221,114 82	$11,637 62
Profits over dividend declared, $1,485,315.57, 5 per cent. of which is..					$74,265 78

13 The tax withheld by the company on the "dividends declared" has been refunded to the claimant under the following statute, and is not now a subject of controversy:

CHAP. 165.

An act for the benefit of the State of Kentucky, Logan and Simpson counties and of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, be, and he is hereby authorized and required to audit and adjust the claims of the sinking fund commissioners of the State of Kentucky, of Logan and Simpson counties in said State, of the city of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee, for internal-revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said counties, and city, respectively, in the Louisville and Nashville Railroad Company and of said State for internal-revenue taxes collected, and interest on railroad bonds of the railroad from Louisville to Lexington and on dividends on stock of said railroads owned by said State, and due and payable to said boards of sinking fund commissioners, respectively, and to said State, counties and

city, to the extent that such taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded, and for this purpose, any statute of limitations to the contrary notwithstanding, sections nine hundred and eighty-nine, thirty-two hundred and twenty, thirty-two hundred and twenty six, thirty-two hundred and twenty-seven, and thirty-two hundred and twenty-eight of the United States Revised Statutes are hereby made applicable and available with the force and effect as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts, when ascertained as aforesaid, and not heretofore refunded shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year.

Approved February 25, 1893 (27 Stat. L., p. 477).

Under this act of 1893 an award was make by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, first, of the claimants' proportional part of the tax paid on cash dividends; second, of the claimants' proportional part in the profits over dividends upon which the company had paid a tax. The Comptroller of the Treasury allowed the former, and it has been paid and is no longer a subject of controversy; he rejected the latter, and it forms the subject, directly or indirectly, of the present suit.

An action will lie upon an award of the Commissioner of Internal Revenue, and it can be attacked only for fraud, mistake, or want of jurisdiction. The statute under which the Commissioner acted, this act of 1893, authorizes and requires him to audit and adjust the claim for "internal-revenue taxes collected on railroad dividends on stock, and on interest," "to the extent that such tax was deducted from any dividends or interest due and payable to such boards, respectively." The question then is, was the Commissioner of Internal Revenue authorized to make this refund of a tax on moneys which were profits, but which were never distributed or paid over to the shareholders as dividends? Or, stated differently, were these taxes deducted "from any dividend or interest due and payable to such boards?"

The distribution upon which the Commissioner of Internal Revenue acted, and which is now relied upon to uphold his action, was a stock dividend ordered by the directors of the company November 16th, 1867: "Resolved that an increase of the stock of forty per cent. be made, the same to be distributed among the owners of stock in proportion to the amounts owned by them at the next closing of the books for the transfer of stock, by certificates
14 of stock to be issued by the company for whole and fractional shares, as the same may be due to each," etc. No deduction of the tax from the scrip dividends of the claimant was ever made in terms. If there was a deduction, it is merely inferable from these facts: (1) That a payment of the tax diminished the amount of the profits of the company; (2) that a stock dividend may be assumed to represent profits not distributed in dividends; (3) that the claimant would have received more stock if the profits had not been diminished by the payment of a tax from which a municipal corpo-

ration was exempt, it being, under the decision of the Supreme Court in the case of The United States *v.* Baltimore and Ohio Railroad (17 Wall. R., 322), "a portion of the sovereign power of a State."

Here it should be premised that the act of 1893 is simply remedial. It does not create a claim or declare a right. All that it does, or assumes to do, is to relieve the claim from the bar of a statute of limitations. It does not empower the Commissioner to refund money which he could not have refunded if the claimant had applied to him in due time and the act of 1893 had never been passed. The exemption of the claimant and the right to a refund must be determined by the act of 1864, under authority of which the tax was imposed and, legally or illegally, collected.

The act of 1864 provides (§ 122) that "any railroad" that may declare "any dividend in scrip, or money due or payable to its stockholders, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a duty of five per centum on the amount of all such interest, or coupons, dividends, or profits, whenever the same shall be payable; and said companies are hereby authorized to deduct and withhold from all payments, on account of any interest, or coupons and dividends due and payable as aforesaid, the duty of five per centum." The act of 1893 uses substantially the same language—"taxes deducted from any dividends or interest due and payable"—and manifestly refers to the same thing. That is to say, the thing referred to by the act of 1893 is the tax deducted and withheld from a dividend due and payable as prescribed and authorized by the act of 1864. What right, then, had the claimant under the act of 1864 to a refund of the five per cent. tax paid on profits which were not distributed as dividends, but retained by the company for its own corporate purposes?

The law of corporations knows no owner of corporate property save the company. No individual or body, corporate or political, can, as a shareholder, set up a personal immunity or privilege and say that it holds stock in a company on other terms and conditions than other shareholders, and ask recognition in law for its exceptional property rights. When a man or a community or a body politic voluntarily enters a corporation and becomes a stockholder he gains the advantage of non-personal liability, and in consideration thereof surrenders control and ownership of the money which he so invests. It is no longer his; it has become the property of the corporation. How the corporation may use it or what it may pay him back is his concern, or a question between him and it. The rest of the world knows him not as a fractional part of the corporate whole, and deals only with the legal entity of the corporate body. To undistributed, unapportioned money which is not his and which is the corporation's he can assert no right—constitutional, legal, or natural.

15 The act of 1864 (§§ 120, 122) recognized this principle of corporations. The purpose of the statute was to impose a tax on all dividends derived from all corporate bodies in the United

States, whether the stock was owned by men, women or children, by citizens or aliens, by residents or non-residents; and the policy of the act was to make the corporate bodies collect and pay over the tax. When a dividend was declared, the money which had been the corporation's became the several shareholders', and the company, *eo instanti*, became the agent or instrumentality of the Government to collect the tax.

Did the money, termed "profits over dividends declared" in the tax return and "profits of such companies carried to the account of any funds or used for construction" in the statute, ever pass to the individual shareholders and become their property, subject to their personal liabilities on the one hand, and entitled to their personal immunities on the other? It remained in the hands of the company and was applied to its business purposes—to improving, increasing, and augmenting the corporate property. It might have been distributed as dividends, but was not. Equitably and morally it may have been the property of the shareholders, and they might have been entitled to receive it, but they elected through their representatives, the directors, to reinvest it in an enlargement of their corporate property, and the reinvestment was as much their act as if they had voluntarily, each and all, paid in the money. In time they elected to issue to themselves evidences of their augmented capital, and these evidences came in the form of stock dividends. In bodies corporate, as in bodies politic, the majority rules, and rules through representatives, and the acts of the majority are the acts of all. If originally the shareholders in this railroad company had elected not to enlarge their business and increase their capital, but to distribute among themselves all of the profits which the company had made, some of them would have received their dividends after the payment of the tax, and some would have received it, or would have been entitled to receive it, without the deduction of the tax; but the latter cannot now say that they should recover a proportional part of a corporate tax for the reason that it was imposed upon profits, and that if their share of such profits had been paid over to them they would not have been liable to pay a tax upon it. The distinction between the two cases of dividends and profits is this, that in the one the shareholder was the owner of the money and was then illegally taxed upon it; in the other, the shareholder was not the owner of the money and the tax imposed upon it was legally imposed and properly paid by the company.

The committees of Congress that reported and recommended the passage of the bill have said in their reports that the only question before them was, "Whether the municipalities named in this bill should be relieved from the bar of the statutes of limitations;" and the ground of the appeal to Congress was that these municipalities were ignorant of the fact that a tax had been deducted from their dividends, and of the law as subsequently declared by the Supreme Court in United States *v.* Railroad Company (17 Wallace, 322). But if the municipalities had known of the payment of the tax on these reserved profits or "undistributed sums," and of the law as

16 subsequently declared by the Supreme Court, of what would it availed them? They could not have asked for a refund at the time when the tax was paid, because the profits had not been turned into a dividend by the company, but had been retained by a corporate body for corporate purposes. They could not have asked for a refund in 1867, when the stock dividend was issued, because more than two years had elapsed since the payment of the tax, and no tax was then paid on the scrip dividend. Furthermore, had there been no statute of limitations the Commissioner of Internal Revenue could not in 1865 or in 1867 have made a refund, for the money was legally collected when the tax was paid, and the tax could not have been invalidated, in whole or in part, by an act of the company done long after the collection. Neither could the Commissioner have held that the distribution of a stock dividend in 1867 was in legal effect the distribution of a cash dividend in 1865. If these municipalities, by reason of their exemption from Federal taxation, are entitled to a refund of their proportional part of this corporate tax merely because the money might have been distributed in dividends when it was not, they are entitled to a refund of their proportional part of every Federal tax which was paid by the company; for every tax was paid out of profits, and lessened profits, and to that extent diminished the dividends which the municipalities might have received.

A natural person holding stock in a corporation cannot say on one day, "I am only a stockholder and am exempt from personal responsibility for the corporate acts of the company," and on another day, "I am part owner of the corporate property, and entitled to have my proportional part recognized and treated as if it were my specific property." Bodies politic stand upon no different footing when they buy and sell in the marts of commerce or become investors in corporate property. They cannot say on one day, "We have assumed no liability on behalf of this company save such as is common to our fellow-shareholders," and on another day, "Our immunity from taxation demands that our proportional part of the corporate property be exempt from taxation also; and if it be ascertained and segregated and set over to us at any time by the act of the corporation, we can retroactively go back and demand a refund of our proportional part of a tax which was paid when our proportional part of the thing taxed was the property of the corporation." The crucial question in this case is, Who was the owner of the property when the tax was collected? and the controlling fact in the case is that the undistributed profits of the company were not the property of the claimant when the tax on them was paid. It was not the claimants' property that was taxed; and there is no law which authorizes a refund to one person of a tax imposed on another person's property, or which authorizes the refund of a tax which was legally imposed and collectible when it was paid.

The judgment of the court is that the petition of the claimants be dismissed.

17 VI.—*Judgment of the Court.*

At a Court of Claims held in the city of Washington on the second day of December, A. D. 1895, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimants, The Commissioners of the Sinking Fund of Logan County and The County of Logan, Kentucky, be dismissed.

BY THE COURT.

18 VII.—*Application for and Allowance of Appeal.*

THE COMMISSIONERS OF THE SINKING FUND OF LOGAN COUNTY and THE COUNTY OF LOGAN, KENTUCKY, *vs.* THE UNITED STATES. } 18316.

From the judgment rendered in the above-entitled case on the second day of December, 1895, by which the petition was dismissed, the claimants, by their attorney, on the 28th day of February, 1896, make application for and give notice of an appeal to the Supreme Court of the United States.

FONTAINE T. FOX,
Attorney for Claimants.

Filed February 28, 1896.

Allowed in open court April 8, 1896.

WILLIAM A. RICHARDSON,
Chief Justice.

19 In the Court of Claims.

THE COMMISSIONERS OF THE SINKING FUND OF LOGAN COUNTY and THE COUNTY OF LOGAN, KENTUCKY, *vs.* THE UNITED STATES. } No. 18316.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court of the judgment of the court dismissing the petition, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this first day of May, A. D. 1896.

Seal Court of Claims.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Case No. 16,274. Court of Claims. Term No., 167. The Commissioners of the Sinking Fund of Logan County and The County of Logan, Kentucky, appellants, *vs.* The United States. Filed May 1, 1896.

No. 105.

Brf. of Atty. Gen'l. (Penney & Pro

for Appellant.

Filed Oct. 29, 1897.

Supreme Court, U.S.
FILED
OCT 29 1897
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT, v. THE COMMISSIONERS OF THE SINKING Fund of the City of Louisville and the City of Louisville, Kentucky.	No. 105.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
THE COMMISSIONERS OF THE SINKING Fund of the City of Louisville and the City of Louisville, Kentucky. } No. 105.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

I.

STATEMENT OF THE CASE.

Between October 1, 1862, and July 6, 1872, the city of Louisville, Ky., held stock and bonds of the Louisville and Nashville Railroad Company, which company paid interest regularly on its bonds, and also from time to time cash dividends on its stock, retaining, however,

in each of the years 1865 to 1871, inclusive, an undistributed surplus. (Rec., 6.) The act of June 30, 1864, section 122 (13 Stats., 284), imposed a tax upon all the earnings of railroad companies, as follows:

> Any railroad * * * company indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due and payable to its stockholders as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a duty of five per centum upon the amount of all such interest, or coupons, dividends, or profits, whenever the same shall be payable, and said companies are hereby authorized to deduct and withhold from all payments on account of any interest or coupons and dividends due and payable as aforesaid the duty of five per centum.

The act of July 13, 1866 (14 Stats., 138), amended the section from which the above is taken, but not in any way affecting the present case. Section 44 of the act of June 30, 1864 (13 Stats., 239), also amended by the act of July 13, 1866, and subsequently reenacted as Revised Statutes, section 3220, provided for the repayment of all taxes erroneously or illegally assessed or collected, but the act of June 6, 1872, section 44 (Rev. Stats., sec. 3228), limited the time for presenting applications for repayment to one year in the case of taxes already collected, and two years in the case of those to be thereafter

collected. The railroad company paid the taxes required by these statutes, and made the deductions from interest and cash dividends as authorized thereby, but in so doing it made no exception in the case of interest or dividends payable to public or municipal corporations. The fact that such taxes were paid upon the interest and dividends due the appellees, and that such deductions were made, was not known to the appellees until after the statutory time for applications for a refund of the taxes so deducted. (Rec., 6.)

By a resolution of the directors of November 16, 1867, the railroad company increased its capitalization by 40 per cent, distributing the new shares of stock among the stockholders in proportion to their holdings of the old stock. By a resolution of October 6, 1880, a further increase of capitalization was made to the extent of 100 per cent, the new shares of stock being distributed among the stockholders *pro rata* as before. (Rec., 6–7.)

On March 10, 1890, the appellees presented a petition to the House of Representatives, stating that taxes had been paid upon and deducted from the dividends declared upon the stock of the railroad company held by the city of Louisville, but making no mention of the stock dividends. (Rec., 7.) Subsequently the act of June 16, 1890 (26 Stats., 157), was passed, directing the Secretary of the Treasury and the collector of internal revenue to audit and adjust the appellees' claim "for internal-revenue taxes on dividends on shares of stock owned" by them "to the extent that such taxes were deducted

from any dividends due and payable to said board [of sinking fund commissioners], and to pass upon said claim and render judgment thereon in the same manner and with the same effect as if said claim had been presented and prosecuted within the time limited and fixed by law."

Under this act the appellees applied for a refund of $65,578.32 on account of taxes claimed to have been illegally exacted of the said city through the Louisville and Nashville Railroad, which amount was stated as follows:

1. Dividends (distributed)	$24,801.14
2. Dividends (undistributed or surplus)	21,721.29
3. Interest on bonds owned by city	815.30
4. Gross receipts	18,240.59
Total tax due	65,578.32

Evidence was presented of the 40 per cent increase in the stock of the railroad company in 1867–68, but it does not appear that any evidence as to the 100 per cent increase of stock in 1880 was presented at that time. (Rec., 7.)

This claim was duly audited and adjusted by the Commissioner of Internal Revenue, who allowed $24,801.14 on account of taxes paid by the Louisville and Nashville Railroad Company on dividends paid to the city of Louisville and $17,712.89 on account of taxes paid in 1865, 1866, and 1867 by the said railroad company on its undistributed surplus, the said sum of $17,712.89 being proportioned to the amount of stock issued to the city of Louisville out of the 40 per cent stock dividend above mentioned. He refused to allow the claim on account of

taxes paid on gross receipts and on interest and so much of the claim on account of taxes on undistributed surplus as concerned the taxes levied in 1868, 1869, 1870, and 1871. The action of the Commissioner was approved by the Secretary of the Treasury, and the First Comptroller did not question the correctness of the finding, but he reported that there was no appropriation out of which payment could be made. (Rec., 7–8.)

The amount allowed ($42,514.03) was reported to Congress by the Secretary of the Treasury February 14, 1891, as having been found due under the act of June 16, 1890, and as having remained unpaid for lack of an appropriation, but no statement of the items of the claim made or of those composing the amount allowed appears to have been made to Congress. (Rec., 9.) Subsequently the sum of $42,514.03 was appropriated by the act of March 3, 1891 (26 Stats., 862, 867), and was paid to the city of Louisville.

The act of February 25, 1893 (27 Stat., 447), directed the Secretary of the Treasury and the Commissioner of Internal Revenue to audit and adjust the claims of the appellees and others "for internal-revenue taxes collected on railroad dividends on stock, and on interest on railroad bonds owned" by them in certain companies "to the extent that such taxes were deducted from any dividends or interest due and payable to such boards respectively and which have not been heretofore refunded, * * * any statute of limitations to the contrary notwithstanding." The act also provided that "the amounts, when ascertained as aforesaid and not heretofore refunded,

shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year."

Under this act the appellees applied for a refund of $34,667.80 on account of taxes claimed to have been illegally exacted, which amount was stated as being partly composed of taxes deducted from interest on bonds and partly of "internal-revenue tax on undistributed dividends or surplus (which was afterwards, to wit, in April, 1881, reduced or converted into a scrip or stock dividend) collected as follows:"

October 31, 1868	$1,304.20
November 30, 1869	529.15
January 10, 1871	829.25
November 10, 1871	345.80
Total	3,008.40

Evidence was presented of the 100 per cent increase in the stock of the railroad company in 1880. The claim for the amounts stated to have been collected from the railroad company on account of taxes levied upon its undistributed surplus in 1868 to 1871 (amounting to $3,008.40 in all), had been included in the claim presented in 1890, but, as stated above, it had not been allowed. (Rec., 10–11.)

The Commissioner of Internal Revenue audited and adjusted this claim, and as incidental to such audit and adjustment he reexamined the claim allowed in 1891. He allowed the entire claim on account of taxes on interest on bonds ($31,659.40), and also that on account of taxes on surplus in 1868–71, which he found to amount to $3,248.51, making a total gross allowance of $34,907.91.

In consequence of the reexamination of the allowance of 1891 errors were found and corrected in all but three of the sixteen items then allowed on account of taxes on dividends, five of the allowances being increased and eight decreased, the aggregate result being a reduction of $221.34, or from $24,801.14 to $24,579.80. Errors were also found in the allowance of 1891 on account of taxes on surplus, which allowance was reduced by $3,327.55, or from $17,712.89 to $14,385.34, making a total reduction on both branches of the allowance of 1891 of $3,548.89, which, being subtracted from $34,907.91 allowed, left a net allowance of $31,359.02. (Rec., 11.)

The amount so allowed, having been approved by the Secretary of the Treasury, was certified by the Fifth Auditor to the First Comptroller, who held that the allowances on account of taxes on surplus were unwarranted, and he therefore deducted the sum of $17,633.85, leaving a balance of $13,725.17, for which sum he directed a draft to be issued to the city of Louisville. The amount so deducted ($17,633.85) was made up as follows (Rec., 11):

Amount allowed and paid in 1891 for taxes on surplus.	$17,712.89
Excess paid in 1891 for taxes on cash dividends.....	221.34
Total erroneous allowance paid in 1891.....	17,934.23
Net amount deducted by Commissioner (for errors in 1891) from allowance for taxes on interest.....	300.38
Balance of erroneous allowance to be deducted.	17,633.85

The appellees brought suit in the Court of Claims for the amount so deducted, and recovered judgment therefor, whereupon this appeal was taken. (Rec., 13–14.)

II.

ASSIGNMENTS OF ERROR.

The Court of Claims erred—

1. In holding that the appropriation of $42,514.02, made by the act of March 3, 1891 (26 Stats., 862, 867), for payment to the city of Louisville, Ky., of the amount found due by the Secretary of the Treasury and the Commissioner of Internal Revenue upon its claim, was such a determination of the exact amount due the said city that no portion thereof could be recovered back on account of a subsequently discovered mistake of fact or error of law, unless Congress authorized a reopening of the settlement.

2. In holding that the act of February 25, 1893, did not authorize, under any circumstances, the reopening and correction of the allowance made under the act of June 16, 1890, the amount of the said allowance having been paid under the act of March 3, 1891.

3. In holding that the First Comptroller was not entitled to deduct from the allowance made under the act of February 25, 1893, either the total sum of $17,633.85 deducted by him or the sum of $3,248.51 (part of the said sum of $17,633.85), which had been allowed for taxes on surplus not covered by the allowance and payment of 1891.

4. In entering judgment for the appellees in the sum of $17,633.43.

III.

BRIEF OF ARGUMENT.

The argument in behalf of the appellant may be summarized in the four following points, which will be considered in their order:

The payment of $42,514.02, made to the city of Louisville under the act of March 3, 1891, did not differ from ordinary Treasury payments as to the power of the officers of the Treasury to correct errors in the settlement and deduct any overpayments, made through mistake of fact or law, from any amounts subsequently found to be due to the said city.

Even if the payment made under the act of March 3, 1891, were of such a character that no portion thereof could be recovered back without subsequent authority of Congress, the act of February 25, 1893, authorized a reopening of the settlement and a deduction from the new allowance, in case any overpayments were found to have been made in the former settlement.

The settlement of 1891, having been reopened, in consequence of the presentation, under the act of 1893, of items disallowed in the former settlement, all errors therein, whether of fact or law, could be corrected and all overpayments deducted in the new settlement.

The deduction of $17,633.85 made by the Comptroller was properly made, as neither of the allowances made by the Commissioner of Internal Revenue in 1891 and 1893, respectively, for taxes paid on surplus earnings of the Louisville and Nashville Railroad Company, were authorized by the statutes under which the Commissioner was acting.

AS TO THE FIRST ASSIGNMENT OF ERROR.

The opinion of the court below shows that its judgment rests on the idea that the act of February 25, 1893, directing the adjustment and payment of certain claims of the appellees and others, did not authorize any reopening of the settlement, made in 1891, of a previous claim of the appellees, and also that the payment of the amount found due by that settlement, having been made by special appropriation, was itself of such a character as to prevent any reopening without special authority of Congress. Taking the latter point first, as the statute which it concerns was the first in point of time, it is submitted that—

THE PAYMENT OF $42,514.02, MADE TO THE CITY OF LOUISVILLE UNDER THE ACT OF MARCH 3, 1891, DID NOT DIFFER FROM ORDINARY TREASURY PAYMENTS AS TO THE POWER OF THE OFFICERS OF THE TREASURY TO CORRECT ERRORS IN THE SETTLEMENT AND DEDUCT ANY OVERPAYMENTS, MADE THROUGH MISTAKE OF FACT OR LAW, FROM ANY AMOUNTS SUBSEQUENTLY FOUND TO BE DUE TO THE SAID CITY.

As the appropriation made by the act of March 3, 1891, was necessitated by the fact that the act of June 16, 1890, carried no appropriation with it, the two acts may properly be considered together. They read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury and the Commissioner of Internal Revenue be, and are

hereby, authorized and required to audit and adjust the claim of the board of the sinking fund commissioners of the city of Louisville, Kentucky, for internal-revenue taxes on dividends on shares of stock owned by said board for said city of Louisville, in the Louisville and Nashville Railroad Company, to the extent that such taxes were deducted from any dividends due and payable to said board, and to pass upon said claim, and render judgment thereon in the same manner and with the same effect as if said claim had been presented and prosecuted within the time limited and fixed by law. (26 Stats., 157.)

PAYMENT TO CITY OF LOUISVILLE, KENTUCKY.—For payment to the city of Louisville, Kentucky, the amount found due under the act of Congress approved June sixteenth, eighteen hundred and ninety, and reported to Congress in House Executive Document numbered two hundred and sixty, of the present session, forty-two thousand five hundred and fourteen dollars and three cents. (26 Stats., 867.)

Had the first act concluded with the words, "and the amount found to be due shall be paid out of any moneys in the Treasury not otherwise appropriated," or had it contained any other provision for an appropriation, and payment had been made thereunder, or had payment been made under any general appropriation, there can be no doubt that if any part of such payment had subsequently been discovered to have been erroneously made it could have been recovered in a suit at law (*United States* v. *Bank of the Metropolis*, 15 Pet., 377, 401), or set off in any suit subsequently brought by the city of Louisville (*McElrath* v. *United States*, 102 U. S., 426;

United States v. *Burchard*, 125 U. S., 176; *United States* v. *Stahl*, 151 U. S., 366), or deducted from any money of the city of Louisville that might subsequently be in possession of the United States (*Gratiot* v. *United States*, 15 Pet., 336; *United States* v. *Carr*, 132 U. S., 644; *Wisconsin Central R. R.* v. *United States*, 164 U. S., 190). Because the first act contained no provision for any appropriation, and no general appropriation was available, the item in the act of March 3, 1891, was required, but there is nothing in that act to show that the payment was to stand on any different basis from what it would have had if made under either a general appropriation or an appropriation clause in the first act. There is merely an appropriation of a certain sum "for payment to the city of Louisville" of "the amount found due" under a certain act and reported to Congress. There is no declaration that the amount "found due" is actually the amount due, or that the entire amount appropriated must be paid. Hence if, before the money was actually paid out, the accounting officers had discovered any errors in the settlement, so that the amount reported to Congress as having been "found due" was more than was actually due, they could certainly have corrected such errors and have limited the payment to what they held to be the amount justly due.

The present case is clearly distinguishable from that of *United States* v. *Jordan* (113 U. S., 418), cited by the court below. There a statute had expressly *directed* the Secretary of the Treasury "to remit, refund, and pay back * * * to the following-named citizens of Tennessee * * * the amount of taxes assessed upon

and collected from the said named persons contrary to [certain Treasury regulations]— * * * that is to say, * * * to Edward L. Jordan, two thousand two hundred and ninety dollars." It was held that Congress had undertaken "to determine not only what particular citizens of Tennessee by name should have relief, but also the exact amount which should be paid to each one of them," and that it had determined "that the amounts named were collected contrary to the provisions of the regulations," so that nothing was left to the Treasury to determine but the identity of the claimants with the persons named in the statute. A similar decision was made in *United States* v. *Price* (116 U. S., 43) upon another statute where the Secretary was "required" to pay specified sums to specified persons.

In the present case, however, the statute contained no direction to pay, nor any statement that the amount reported to Congress was the amount actually due, but merely appropriated money to enable the Treasury to pay the amount found due, or, in other words, to give the Treasury the same authority to pay that it would have had if the act authorizing the settlement had carried an appropriation with it. Of course, Congress presumed that the amount reported as due was correct, but if it had made an appropriation in the first instance it would equally have presumed that whatever amount might be ultimately found due the finding would be correct, and that none of the money would be paid on an erroneous or illegal allowance. In every appropriation that Congress makes for future expenses it necessarily presumes that the appropriation will be properly spent, and

only for expenses warranted by law. The only difference between the appropriation of March 3, 1891, and one that might have been made by the act of March 10, 1890, was that the one was subsequent to the settlement and the other would have preceded it. The presumption of the correctness of the settlement would have been precisely the same in either case.

Since, then, the officers of the Treasury could have retained a portion of the sum, appropriated March 3, 1891, in case, before payment, they found that the allowance was excessive, it is manifest that if errors were discovered after payment had been made, the excess payment over and above what was justly due could have been sued for, or set off in any suit by the city of Louisville, or deducted from any moneys of that city that might subsequently be in possession of the Treasury, precisely as if the payment had been made either under a general appropriation or one contained in the act authorizing a settlement. Hence, if the deductions made in 1893 by the Commissioner of Internal Revenue and the Comptroller were correct in themselves—a matter which will be considered below—they were properly made, and should not be recovered by the appellees.

In this particular connection it only remains to point out that there is nothing in the act of March 3, 1891, to show that Congress adopted the view taken by the Treasury officers in 1891 with regard to the legality of the claims covered by the settlement. The peculiarity of the settlement—the feature which gave rise to the Comptroller's action in 1893 and to the present suit—was that, although the act of June 16, 1890, had only authorized a claim

for taxes deducted from "dividends due and payable" on shares of stock, the appellees had made claim also for what they alleged to be their proportion of the taxes paid by the Louisville and Nashville Railroad Company on its undistributed surplus profits; and the greater part of this claim was allowed, on the theory that these surplus profits were ultimately distributed to the stockholders in the form of a stock dividend. The fallacy underlying this theory will be considered below, and it is enough at this point to submit (on the authority of *County of Logan* v. *United States*, 31 C. Cls. R., 23, now before this court on appeal) that the allowance for taxes on surplus was not warranted by the act of 1890, and to show that Congress did not intend by the appropriation of 1891 to declare that such allowance was warranted, or to legalize it in any way whatever.

The appropriation of 1891 defines the amount to be paid to the city of Louisville as "the amount found due under the act of June 16, 1890," and also as the amount reported in Executive Document No. 260, and it further states the amount as $42,514.03. Now, the only amount that was *really* found due under the act of June 16, 1890 (i. e., the only amount which was found due under the authority conferred by that act), was $24,801.14, the amount of taxes found to have been "deducted from any dividends due and payable," that being the only species of taxes which that act authorized to be found as due. Executive Document No. 260 (which is given in full in Finding VI as the communications transmitted to Congress), merely stated that after auditing the claim in pursuance of the act of June 16, 1890, the Secretary and the

Commissioner had found $42,514.03 to be due, but it did not state how the amount was made up. Moreover, the statement that $42,514.03 had been found "due," meaning that it had been found to be due under the terms of the act of June 16, 1890 (and the statement could have had no other conceivable meaning), was, legally speaking, false, as only $24,801.14 had been so fouund to be due. The appropriation act recites this false and misleading document as the only source of knowledge on the part of Congress as to the finding by the Secretary and the Commissioner, and it does not appear that Congress was made aware of their action in any other way. The very words of the appropriation act show that Congress was misled in the matter, just as much so as if the Secretary and the Commissioner had either erred by mistake of fact or had added to the amount of the claim by deliberate fraud.

To hold that the appropriation was a ratification or legalization of the unauthorized allowance is to read into the act such words as these:

> and the finding so made and reported is hereby recognized as properly made, within the true intent and meaning of the act of June 16, 1890.

Or these:

> to be paid to the said city of Louisville, whether the said amount was actually and legally due under the said act of June 16, 1890, or not.

Or these:

> and the finding so made and reported is adopted as if it had been made in pursuance of the act of June 16, 1890, and had been within its true intent and meaning.

The idea that Congress intended to waive errors or illegalities, and to pay the claim whether justly due under the act of June 16, 1890, or not, is supported by no evidence whatever, and certainly the existence of such an intention can not be presumed. The idea that Congress saw fit to ratify the illegal act of the Secretary and the Commissioner, and to treat it as if the act of June 16, 1890, had authorized an allowance on account of taxes on surplus earnings is equally untenable, because it is familiar law that a principal can not be held to have ratified the unauthorized acts of his agent unless he be shown to have had full knowledge of the facts. (*Bell* v. *Cunningham*, 3 Pet., 69, 81; *Owings* v. *Hull*, 9 Pet., 607, 629; *Billings* v. *Morrow*, 7 Cal., 171; *Field* v. *Small*, 17 Colo., 386; *Davis* v. *Talbot*, 137 Ind., 235; *Adams Express Co.* v. *Trego*, 35 Md., 47, 69; *Bannon* v. *Warfield*, 42 Md., 22, 42; *Harley* v. *Watson*, 92 Mich., 121; *Dowden* v. *Cryder*, 55 N. J., 329; *Trustees* v. *Bowman*, 136 N. Y., 521.) The only ground on which it could be contended that the appropriation of $42,514.03 was a ratification of the entire action of the Secretary and the Commissioner in finding that amount to be due is, that the position of Congress and these officers was somewhat analogous to that of a principal and his agents, but there being no evidence that Congress was aware of the real nature of the claim which these officers had seen fit to approve or of the fact that they had exceeded their authority—it being, in fact, evident that Congress was misled by the statements made to it—it is clear that one necessary condition of a ratification

(viz, full knowledge on the part of the principal) does not exist in this case, and hence that the theory of a ratification must fall.

To hold that Congress intended, in the appropriation item of March 3, 1891, to adopt the view taken by the Secretary and the Commissioner in applying the act of 1890, is as unreasonable as it would be to hold that a ratification was intended. These officers had no judicial authority to construe the law, and it appears that Congress was not informed as to the peculiar construction which they put upon it. It was held in *Savings Bank* v. *United States* (19 Wall., 227, 237), that the reenactment of a tax law in the same language as that of the earlier law did not indicate that Congress adopted the construction put by the Commissioner upon that language during a period of three years; and certainly in the present case there is even less reason for holding that his construction was adopted, as there is every indication that Congress did not know what that construction was.

Whatever, then, be the effect of the appropriation of 1891, it bears on its face the evidence of having been made in ignorance of the true state of the facts, and it furnishes no support for the contention that Congress, either then or at any other time, intended to pay to the claimants any sum whatever on account of taxes on surplus profits of the Louisville and Nashville Railroad Company.

It is to be observed that although the court below held (erroneously, as has been submitted), that the appropriation of 1891 was made in terms that required the money to be paid, without regard to errors in the allowance,

this decision was made solely on the doctrine of *United States* v. *Jordan*, and not on the ground that Congress knowingly approved the settlement as in accordance with the act of 1890. In point of fact, the same court decided on the same day (in *County of Logan et al.* v. *United States*, 31 C. Cls. R., 23, now before this court on appeal) that the act of February 25, 1893 (27 Stats., 477), authorizing the settlement of certain claims of the appellees and others "for internal-revenue taxes collected on railroad dividends on stock," and under which act Logan County had made precisely the same sort of claim as the appellees had made under the act of 1890, did not authorize any refund of taxes paid on undistributed surplus earnings, as the taxes were not such as could originally have been recovered under the acts of 1864 and 1866, and the subsequent stock dividend had not changed their character in any way. Had the court below held that the appropriation of 1891 settled the law as to the right to recover back taxes on surplus, this decision against such right would not have been made.

If, therefore, as has been submitted, the payment under the appropriation of 1891 did not differ from an ordinary Treasury payment, whatever part of it was erroneously allowed could at any time have been deducted from any moneys of the city of Louisville in the hands of the Treasury, and hence was properly deducted in the present instance, whether the act of February 25, 1893, authorized a reopening of the settlement under any circumstances or not, and the propriety of the deduction will be considered below without regard to whether there actually was any reopening or not.

AS TO THE SECOND ASSIGNMENT OF ERROR.

In regard to the act of 1893 it is submitted, in the first place:

EVEN IF THE PAYMENT MADE UNDER THE ACT OF MARCH 3, 1891, WERE OF SUCH A CHARACTER THAT NO PORTION THEREOF COULD BE RECOVERED BACK WITHOUT SUBSEQUENT AUTHORITY OF CONGRESS, THE ACT OF FEBRUARY 25, 1893, AUTHORIZED A REOPENING OF THE SETTLEMENT AT THE APPELLEES' INSTANCE, AND CONSEQUENTLY A DEDUCTION FROM THE NEW ALLOWANCE IN CASE ANY OVERPAYMENTS WERE FOUND TO HAVE BEEN MADE IN THE FORMER SETTLEMENT.

The act of 1893 reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, be, and he is hereby, authorized and required to audit and adjust the claims of the sinking fund commissioners of the State of Kentucky, of Logan and Simpson counties in said State, of the city of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee, for internal-revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said counties and city, respectively, in the Louisville and Nashville Railroad Company and of said State for internal-revenue taxes collected and interest on railroad bonds of the railroad from Louisville to Lexington and on dividends on stock of said railroads owned by said State, and due and payable to said boards of sinking fund commissioners, respectively, and to said State, counties, and city, to the extent that such

taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded; and for this purpose, any statute of limitation to the contrary notwithstanding, sections nine hundred and eighty-nine, thirty-two hundred and twenty, thirty-two hundred and twenty-six, thirty-two hundred and twenty-seven, and thirty-two hundred and twenty-eight of the United States Revised Statutes are hereby made applicable and available with the force and effect as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts when ascertained as aforesaid, and not heretofore refunded, shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year. (27 Stats., 477.)

As regards these appellees, the above act differs from that of June 16, 1890 (26 Stats., 157), in that they had made no application for refund before that act was passed, whereas, as Congress knew, when the act of 1893 was passed, the appellees had already made a claim and received an allowance, which had been paid by a special appropriation, on one of the matters (viz, taxes on dividends), for which the act of 1893 authorized claims to be presented, audited, and paid. Hence, in regard to these appellees, three things were possible:

First, that claims should be presented for taxes refunded on the former application.

Second, that claims should be presented for items disallowed on the former application.

Third, that errors should have been made in the former allowance.

Congress must be presumed to have had these three contingencies in mind, because they would naturally suggest themselves to any man of ordinary intelligence when called upon to consider the matter.

The first contingency was expressly provided for by limiting the allowance and payment to claims for taxes which had not been already refunded, and this limitation necessitated a careful reexamination of every item of the former allowance, in order to ascertain positively whether any portion of the second claim for refund had been included in the prior allowance and payment.

The second contingency was dealt with by not forbidding the presentation a second time of items previously disallowed, and it was evident from the first that the presentation of any such items necessitated a reconsideration of the previous decision (or "judgment," as the act of 1890 called it) whether such decision were ultimately adhered to or not; and if such decision were departed from, that would involve a setting aside of the previous settlement.

The Commissioner of Internal Revenue being required to reopen the old settlement in case the second contingency occurred, and no restriction being placed upon his power to change the former allowances, it is clear that if the second contingency occurred, and the settlement were reopened in consequence, any errors in the previous settlement could be corrected, or, in other words, the third contingency might also be dealt with.

Of course Congress *might* have provided that the settlement should only be reopened for the benefit of the appellees, and that no change therefrom for the benefit of the

appellant should be made, just as Congress *might* have forbidden the consideration of items previously disallowed, and thus prevented a possibility of a reopening for either side; but it did not see fit to do so, and it would have been most unfair to the United States if it had. Without any such restriction of what might be done under a reopening, it is clear that if the reopening took place anything might be done which would be permissible in any case of reopening. A settlement once made must either remain closed or be reopened; it is inconceivable that it should be reopened as to one party, while remaining closed as to the other, unless in a case where Congress has expressly authorized the existence of such an anomalous state of affairs.

In *McElrath* v. *United States* (102 U. S., 426, 441) this court expressly laid down the doctrine that if a settlement is reopened for the benefit of one side, the other side also can claim the benefit of such reopening. The opinion reads as follows:

> Had the appellant rested upon the settlement of his account by the proper officers of the Government his right to invoke the general rule [of the finality of such settlements] would have been entitled to more consideration than it can now receive. * * * This suit itself invites the court to go behind that settlement, to reexamine all the questions arising out of the appellant's claim for full pay and allowances, and to correct the error which he insists was committed to his prejudice by the accounting officers of the Government. The Government * * * meets him upon his own chosen ground, and, insisting that its officers, misapprehending the law, paid to

> him out of the Treasury money to which he was not legally entitled, asks, as we think it may rightfully do, judgment for the amount thus improperly paid to him.

The case just cited involved the reopening of a settlement by means of a proceeding in court, but the doctrine obviously applies as well where the settlement is reopened in the Treasury itself, by special authority of Congress. No argument that applies in the case of a reopening of the former sort can fail of application in the latter case also.

It follows, then, that the court below was clearly in error when it held that "the statute [of 1893] as it stands expresses no intent to disturb what has been done, and no such intent can be read into it where there is no such implication." (Rec., 13.) If the previous settlement had not been one of disallowance as well as of allowance, or if the statute had forbidden the presentation of items previously disallowed, then the statement just quoted would have been correct, but the court below has overlooked the fact that, under the circumstances of the case, the act permitted a reopening, even though it did not require it.

Even conceding, for the sake of the argument, that the doctrine of *United States* v. *Jordan* (113 U. S., 418), referred to by the court below, would have prevented any part of the payment of 1891 from being recovered back without further authority from Congress, yet that doctrine can have no application here, because Congress did, by the act of 1893, authorize a reopening of the settlement.

In so doing, moreover, it did not take away any property of the appellees, because the act of 1893 granted them a privilege, which they could use or not as they chose, and hence whatever conditions its terms involved could properly be imposed.

The error into which the court below fell was manifestly due to its failure to distinguish between a reopening of the old settlement by the officers of the Treasury of their own motion, and a reopening on the motion of the appellees, in consequence of the renewed presentation of claims disallowed on that settlement. The former was not authorized by the act of 1893, but the latter was clearly permitted, for the old settlement being of a claim for taxes on dividends, and the presentation of precisely similar claims being authorized by the act of 1893, it would have required express language to forbid the presentation of items previously presented and rejected. In fact the very prohibition of the payment of taxes previously refunded would seem, on the doctrine of *expressio unius est exclusio alterius*, to be a positive warrant, both for the presentation and the allowance (if they were sufficiently proved), of items previously presented and rejected. Of course such a reopening might not have taken place at all; it depended on the appellees as to whether it should take place or not; but if it did once take place, it would have necessarily to be a complete reopening, which might result in a reduction of the allowance as to some items as well as an increase as to others, or even without any increase whatever.

Coming then to what was actually done under the act of 1893, it is further submitted:

THE SETTLEMENT OF 1891 HAVING BEEN REOPENED, IN CONSEQUENCE OF THE PRESENTATION, UNDER THE ACT OF 1893, OF ITEMS DISALLOWED IN THE FORMER SETTLEMENT, ALL ERRORS THEREIN, WHETHER OF FACT OR LAW, COULD BE CORRECTED, AND ALL OVERPAYMENTS DEDUCTED IN THE NEW SETTLEMENT.

The act of 1893 having contained no prohibition of the presentation of claims previously disallowed, the appellees presented a claim not merely for taxes paid on interest on bonds (a claim which was not presentable under the act of 1891), but also for the following items:

To internal-revenue tax on undistributed dividends or surplus (which was afterwards, to wit, in April, 1881, reduced or converted into a scrip or stock dividend) collected as follows:

October 31, 1868	$1,304.20
November 30, 1869	529.15
January 10, 1871	829.25
November 10, 1871	345.80
Total	3,008.40

These items had formed part of the claim presented under the act of 1890 (Rec., p. 11), but had been disallowed by the Commissioner of Internal Revenue, apparently because of lack of evidence of the issue of any stock dividend after that declared in 1867 and issued in 1868. To remedy this defect, the claimants, in 1893, presented evidence of the declaration of a stock dividend of 100 per cent in 1880, and of the issue of stock in consequence thereof.

Had the appellees not seen fit to make claim for these items, then (supposing, for the sake of the argument, that no part of the payment of 1891 could be recovered back without a reopening by authority of Congress,) the settlement of 1891 could not have been reopened; for the mere reexamination of the items of that settlement, required by the act of 1893, in order to prevent any allowance of taxes already refunded, could not strictly be called a reopening, and there was nothing in the act to authorize the Commissioner of Internal Revenue to reopen the settlement of his own motion without a request from the appellees. The appellees, however, by presenting again these previously disallowed items, demanded a reconsideration of the previous decision, and a setting aside of the old settlement which had excluded these items. Accordingly the Commissioner not merely proceeded to compare the new claim with the old allowance, so as to avoid duplication of items, but he also received the new evidence presented in support of the previously rejected items; and, further, the old settlement having been opened on the appellees' demand, the reopening could not be confined to the particular items as to which reopening was asked, and hence the correctness of every item of the old settlement was inquired into.

The allowances in the old settlement had been $17,712.89 on account of taxes paid in 1865, 1866, and 1867 on the undistributed surplus earnings of the Louisville and Nashville Railroad, which taxes the Commissioner had treated as having been deducted from the stock dividend made in 1868, and $24,801.14 on account of

taxes paid on cash dividends, making $42,514.03 in all. (Rec., 7–8.) The result of the reopening and reexamination was that out of the sixteen items allowed in 1891 on account of taxes on dividends (semiannual dividends for eight years) five were increased, eight decreased, and only three remained unchanged, while the allowance for taxes on surplus, treated as stock dividend, was also found to have been excessive and was reduced by $3,327.55. The previously rejected items of taxes paid on surplus earnings in 1868–1871, regarded as taxes deducted from the stock dividend of 1880, were allowed on the new evidence presented in support of them, and were even increased, $3,248.57 being found to be due on this account instead of $3,008.40, as claimed. In spite, however, of this new allowance and of the increase of some of the old items, the reductions were such that the ultimate effect of the reopening was that $300.38 was found to have been paid the appellees on account of taxes on dividends, both cash and stock, in excess of what the Commissioner held to have been really due both on the items originally allowed and on those originally rejected but now reconsidered and allowed. This sum of $300.38 was accordingly deducted from the sum of $31,659.40, found due for taxes on interest, leaving a balance of $31,359.02. (Rec., 11.)

The Commissioner not merely reopened the former settlement, allowing items previously rejected and changing the allowances in all but three of the items previously allowed, but he treated the claims presented in 1890 and 1893 as one account, on which a partial payment had been

made. He accordingly reported to the Secretary of the Treasury as follows (Rec., 11):

> The total amount so withheld from said city [Louisville] on account of tax on the coupons of said bonds is found to be thirty-one thousand six hundred and fifty-nine dollars and forty cents ($31,659.40), and the total share of taxes on dividends and surplus borne by the city is found to be forty-two thousand two hundred and thirteen dollars and fifty-seven cents ($42,213.57), making an aggregate of seventy-three thousand eight hundred and seventy-two dollars and ninety-seven cents ($73,872.97). Of this aggregate the sum of forty-two thousand five hundred and thirteen dollars and ninety-five cents ($42,513.95) has been refunded (see Fifth Auditor's report No. 58114), which leaves thirty-one thousand three hundred and fifty-nine dollars and two cents ($31,359.02) to be refunded. I propose to allow the claim for this amount.

This action of the Commissioner in deducting for errors in the previous allowance $3,548.89 (i. e., $221.34 from allowance for taxes on dividends, and $3,327.55 from that for taxes on surplus) from the allowance made on the new claim was not objected to by the appellees, who sued merely for the further amount of $17,633.85, subsequently deducted by the Comptroller for reasons which will be considered below; and hence the court below has only given judgment for this amount, and has said nothing directly in the opinion as to the legality or illegality of the Commissioner's action. On the theory of the court below, however, the Commissioner had no right either to allow items disallowed on the old settlement or to alter previous allowances, and

suit should have been brought for $17,934.23, being the total amount of all deductions made either by the Commissioner or the Comptroller from the amount found due on the items not involved in the old settlement, viz, those for taxes paid on interest on bonds. It is submitted, however, on the part of the appellant, that the Commissioner was authorized, under the act of February 25, 1893, not merely to correct mistakes of fact in the old settlement, but also, that settlement having been reopened at the appellees' instance, to correct whatever he might consider errors of law therein. The fact that he did not himself see errors of law therein is immaterial.

AS TO THE THIRD AND FOURTH ASSIGNMENTS OF ERROR.

In regard to the deduction made by the Comptroller over and above those made by the Commissioner, it is submitted:

THE DEDUCTION OF $17,633.85, MADE BY THE COMPTROLLER, WAS PROPERLY MADE, AS NEITHER OF THE ALLOWANCES MADE BY THE COMMISSIONER OF INTERNAL REVENUE IN 1891 AND 1893, RESPECTIVELY, FOR TAXES PAID ON SURPLUS EARNINGS OF THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, WERE AUTHORIZED BY THE STATUTES UNDER WHICH THE COMMISSIONER WAS ACTING.

The Commissioner had confined himself to correcting errors of fact in the old settlement, and to reconsidering the former disallowance of the items for taxes on surplus in 1868–1871. When, however, the allowance reached the

Comptroller, he considered that nothing ought at any time to have been allowed on account of taxes on surplus, and therefore deducted $17,633.85 on that account. This amount is stated in the findings as made up as follows:

Amount allowed and paid in 1891 for taxes on surplus..	$17,712.89
Excess paid in 1891 for taxes on cash dividends.....	221.34
Total erroneous allowance paid in 1891.....	17,934.23
Net amount deducted by Commissioner (for errors in 1891) from allowance for taxes on interest.....	300.38
Balance of erroneous allowance to be deducted.	17,633.85

It can also, and perhaps better, be stated as follows:

Erroneous allowance of 1891 for taxes on surplus in 1865–1867.....	$17,712.89
Deducted by Commissioner in 1893 for errors of computation in this allowance.....	3,327.55
Net allowance of 1891 for taxes on surplus.....	14,385.34
Erroneous allowance of 1893 for taxes on surplus in 1868–1871.....	3,248.51
Total erroneous allowance deducted by Comptroller.....	17,633.85

This deduction of $17,633.85 is the cause of the present suit; and in connection with the present branch of the argument, three points need to be considered in regard thereto, viz:

1. Whether the allowances for taxes on surplus had been authorized by law.

2. Whether a deduction on account of errors of law in a previous settlement could properly be made in the Treasury Department.

3. Whether the Comptroller could properly make a deduction from an allowance of this character.

(1.)

Whether the allowances for taxes on surplus had been authorized by law.

As to this point it is submitted:

THE ACTS OF JUNE 16, 1890, AND FEBRUARY 25, 1893, DID NOT AUTHORIZE THE ALLOWANCE OF ANY CLAIM ON ACCOUNT OF TAXES PAID BY THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY UPON ITS UNDISTRIBUTED SURPLUS, AND THE FACT THAT IN 1867 AND IN 1880 THE SAID COMPANY INCREASED ITS CAPITALIZATION BY ISSUING ADDITIONAL CERTIFICATES OF STOCK TO SHAREHOLDERS IS WHOLLY IMMATERIAL.

The facts of the case are very simple. The act of June 30, 1864, § 122 (13 Stats., 284), provided—

> That any railroad * * * company indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due and payable to its stockholders as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a duty of five per centum upon the amount of all such interest or coupons, dividends or profits, whenever the same shall be payable, and said companies are hereby authorized to deduct and withhold from all payments on account of any interest or coupons and dividends due and payable as aforesaid the duty of five per centum, * * * and a list or return shall be made and

> rendered to the assessor or assistant assessor in duplicate, and one of said lists or returns shall be transmitted and the duty paid to the Commissioner of Internal Revenue within thirty days after the time when said interest, coupons, or dividends become due and payable, and as often as every six months.

Section 103 of the same act (13 Stats., 275) imposed a tax on the gross receipts of railroad companies, and hence those companies paid four taxes, viz, on gross receipts, on interest on bonds, on dividends paid, and on undistributed earnings. Only the taxes on interest and on dividends were or could be deducted from the payments made by the companies; the other taxes were necessarily paid by the companies themselves, as distinguished from their stockholders or bondholders.

The amendatory act of July 13, 1866 (14 Stats., 138), did not change this section as to any matter involved in the present case, so that the section above quoted contains all of the internal-revenue law with which we are now concerned. It is in evidence that the Louisville and Nashville Railroad Company paid taxes, under the above laws, upon the dividends on its stock, including that held by the appellees, and deducted such taxes from the amount of the dividends, but, as regards the stock held by the appellees, such payment and deduction was unlawful, as decided in *United States* v. *Railroad Co.* (17 Wall., 322). The time having elapsed within which the appellees could, under the laws then in force, apply for a refund of these taxes, the acts of 1890 and 1893 were passed, and hence the object of those acts was to enable the claims of the appellees to be audited and adjusted "in the same

manner and with the same effect as if this claim had been presented and prosecuted within the time limited and fixed by law."

This being so, the claims may be regarded solely with reference to the appellees' rights under the act of 1864, just as if claim had been made when it ought originally to have been made.

In presenting their claim to the Commissioner of Internal Revenue under the acts of 1890, the Louisville sinking fund commissioners included all the four kinds of taxes which the Louisville and Nashville Railroad Company had been called upon to pay, viz (Rec., 7):

1. Dividends (distributed)	$24,801.14
2. Dividends (undistributed or surplus)	21,721.29
3. Interest on bonds owned by city	815.30
4. Gross receipts	18,240.59
Total tax due	65,578.32

The first item, cash dividends actually distributed, was clearly within the act of 1890, which authorized a claim for taxes "deducted from any dividends due and payable," but as that act did not authorize a claim for anything else, the third and fourth items were as clearly outside its operation, and hence were at once rejected by the Commissioner. (Rec., 8). As the taxes on surplus, covered by the second item, had never been deducted from any payments made to the appellees nor were referred to in the act of 1890, this item also should have been rejected, but it appeared that a stock dividend of 40 per cent had been declared in 1867 and distributed in 1868, and it was urged that the surplus had been converted into this stock dividend, which had therefore been

diminished to the extent of the taxes collected on the surplus. This contention prevailed with the Commissioner, and the allowance covered $17,712.89, on account of taxes paid in 1865, 1866, and 1867 on so much of the undistributed surplus as was in proportion to the amount of stock held by the appellees. (Rec., 7.)

This part of the allowance was wholly illegal, because no such allowance could have been made under section 44 of the act of June 30, 1864 (Rev. Stat., sec. 3220), and the act of June 16, 1890, merely authorized such an allowance for taxes on dividends as could have been made had the application been made in due time. This precise point has been absolutely decided by the Court of Claims in *County of Logan* v. *United States* (31 C. Cls. R., 23), now before this court on appeal (October term, 1897, No. 167). That decision was rendered in regard to the act of February 25, 1893, but as the provisions of the two acts in regard to taxes on dividends are in substance exactly the same, the decision is equally applicable to cases under either act. The court's line of argument was as follows:

> It should be premised that the act of 1893 is simply remedial. It does not create a claim or declare a right. All that it does, or assumes to do, is to relieve the claim from the bar of a statute of limitations. It does not empower the Commissioner to refund money which he could not have refunded if the claimant had applied to him in due time and the act of 1893 had never been passed. The exemption of the claimant and the right to a refund must be determined by the act of 1864, under authority of which the tax was imposed and, legally

or illegally, collected. * * * The ground of the appeal to Congress was that these municipalities were ignorant of the fact that a tax had been deducted from their dividends and of the law as subsequently declared by the Supreme Court in *United States* v. *Railroad Company* (17 Wallace, 322). But if the municipalities had known of the payment of the tax on these reserved profits or "undistributed sums" and of the law as subsequently declared by the Supreme Court of what would it avail them? They could not have asked for a refund at the time when the tax was paid, because the profits had not been turned into a dividend by the company, but had been retained by a corporate body for corporate purposes. They could not have asked for a refund in 1867, when the stock dividend was issued, because more than two years had elapsed since the payment of the tax, and no tax was then paid on the scrip dividend. Furthermore, had there been no statute of limitations the Commissioner of Internal Revenue could not in 1865 or in 1867 have made a refund, for the money was legally collected when the tax was paid, and the tax could not have been invalidated, in whole or in part, by an act of the company done long after the collection. Neither could the Commissioner have held that the distribution of a stock dividend in 1867 was in legal effect the distribution of a cash dividend in 1865. * * * The crucial question in this case is, *Who was the owner of the property when the tax was collected?* and the controlling fact in the case is *that the undistributed profits of the company were not the property of the claimant when the tax on them was paid.* It was not the claimants' property that was taxed; and there is no law which authorizes a refund to one person of a tax imposed on another person's

property, or which authorizes the refund of a tax which was legally imposed and collectible when it was paid.

For an elaboration of that argument the court is referred to the whole opinion of the Court of Claims in the Logan County Case, as printed in the record of that case on appeal (No. 167), and if further argument be needed to sustain the application of that decision to this present case it will be found in the following pages.

The only claim which the Secretary and the Commissioner were authorized to audit and adjust was one "for taxes on dividends on shares of stock * * * to the extent that such taxes were *deducted* from dividends due and payable." Under the revenue acts of 1864 and 1866 dividends "in scrip or money" were taxable, and the Commissioner treated the claim on account of taxes on surplus in 1865–1867 as a claim on account of taxes on scrip dividends, but to authorize an allowance for such taxes it was necessary that the railroad company should have done three things:

(1) Declared dividends in scrip in those years.

(2) Paid taxes thereon.

(3) Deducted those taxes from the dividends.

The reason why Congress in the remedial acts of 1890 and 1893 required that the taxes should have been "deducted" and not merely paid is clear. The most recent decisions hold that a tax on dividends is a tax on the net earnings of a corporation, and not a tax on the stockholders (*Barnes* v. *The Railroads*, 17 Wall., 294; *Railroad Co.* v. *Collector*, 100 U. S., 595; *United States*

v. *Erie Railway Co.*, 106 id., 327; *Memphis and Charleston Railroad Co.* v. *United States*, 108 id., 228), and it was only on the ground that the corporation was entitled to recoup itself out of the dividends that it was held that the act of 1864 did not authorize a tax on dividends of stock owned by municipal corporations (*Bailey* v. *Railroad Company*, 22 Wall., 604). The deduction from the dividend is clearly all that entitles a municipality to recover the tax paid on the dividends on its stock. If, as to any dividend, there was no deduction, there can be no recovery.

Whether or not the stock dividend declared in 1867 and issued in 1868 was a "dividend in scrip" within the meaning of the act is unimportant for the purposes of the present argument; but, assuming that the appellees were right in contending that it was, the fact remains that no such "dividend in scrip" was declared in 1865 or 1866, but only in 1867. Hence, while the first of the three essential conditions just mentioned existed with regard to the claim based on the taxes of 1867, it did not exist with regard to those based on the taxes of 1865 and 1866, and of course the other two essential conditions did not exist with regard to those two claims.

Coming to the second condition, the record does not show that any tax was paid by the railroad company, even upon the stock dividend declared in 1867. In other words, neither the second nor the third condition existed in regard to this stock dividend.

The whole claim for a refund of taxes paid on stock dividends, therefore, falls to the ground, for the very sufficient reason that no such taxes were paid; and hence,

as already stated, the allowance of such a claim was wholly without warrant of law.

To prevent misunderstanding, it may be as well to state at this point that had any stock dividends issued by the railroad company been taxed, the appellees' share in them would have been exempt under *United States* v. *Railroad Company* (17 Wall., 322), *Stockdale* v. *Insurance Companies* (20 id., 323, 330), and *Bailey* v. *Railroad Company* (22 id., 604, 632), the doctrine being, as stated in the case last cited, that—

> Liabilities of the kind [for taxes on dividends] do not attach to the company in cases where the stockholder is exempt by law from such an exaction, as the same section of the act provides that the company in such a case is authorized to deduct and withhold the amount of the tax from all payments on account of such interest or coupons and dividends, which can not have any application in a case where the stockholder is by law exempt from any such exaction.

As stated in the last two cases cited above, this doctrine holds, whether the tax levied under section 122 of the act of 1864 be regarded as a tax on the income of stockholders and bondholders, as was held in the earlier cases (*Haight* v. *Railroad Co.*, 6 Wall., 15; *Railroad Co.* v. *Jackson*, 7 id., 262, and *United States* v. *Railroad Co.*, 17 id., 322), or as a tax on the net earnings of the corporation, as laid down in *Barnes* v. *The Railroads* (17 Wall., 294), *Railroad Co.* v. *Collector* (100 U. S., 595), *United States* v. *Erie Railway Co.* (106 id., 327), and *Memphis and Charleston Railroad Co.* v. *United States* (108 id., 228).

In the present case, however, there were, as already stated, no stock dividends which were taxed, and it is clear that the claim was not in reality for any taxes paid on "dividends in scrip" or "stock dividends" issued to the appellees at all, but for a certain proportion of the taxes paid on that part of the profits which was not distributed in dividends, but constituted what the acts of 1864 and 1866 call "profits carried to the account of any fund or used for construction." These profits were, however, a very different thing from the stock dividends, and the taxes paid upon them were in no sense taxes upon any stock dividend.

It is familiar doctrine that the property of a corporation belongs to it and not to its stockholders, and this is no less true of its undistributed net earnings than of any other kind of property. (*Minot* v. *Paine*, 99 Mass., 101, 106; *Gibbons* v. *Mahon*, 136 U. S., 549, 558.) This doctrine was recognized by the act of 1864 itself, for while that act authorized corporations to deduct from the amounts paid out as interest and cash dividends the amount of the taxes on such interest and dividends, no such deduction was possible in the case of profits carried to surplus account, because the company retained these profits, so that they never came into the possession of the stockholders. Whether, as the earlier cases held, the tax on interest and dividends was an income tax on bondholders and stockholders or not, it is perfectly clear that the tax on undistributed profits, whether carried to surplus account or used in construction, was, like the tax on gross earnings, a tax on the corporation and not on its stockholders.

The declaration of a stock dividend in 1867 in no way altered the character of the previous surplus earnings. They were not distributed among the stockholders, but remained the property of the corporation precisely as they had been before.

> Stock dividends never diminish or interfere with the property of a corporation. * * * After a stock dividend a corporation had just as much property as it had before. It is just as solvent and just as capable of meeting all the demands upon it. After such a dividend the aggregate of the stockholders own no more interest in the corporation than before. The whole number of shares before the stock dividend represented the whole property of the corporation, and after the dividend they represent that, and no more. *A stock dividend does not distribute property*, but simply dilutes the shares as they existed before. (*Williams* v. *Western Union Tel. Co.*, 93 N. Y., 162, 189.)

The same doctrine is maintained in 2 Beach on Private Corporations, section 477; title, "Dividends," 5 Am. and Eng. Encyc. of Law, 744a, 744b, and clearly underlies the decision in *Minot* v. *Paine* (99 Mass., 101, 107), where the court said:

> When they [the directors] increase the number of shares, each share of all the stock in the corporation is in its nature capital. The new shares take their place among the old ones, and each of the old shares thereby *becomes a less proportion of the whole stock than it was before*, and is entitled to a less proportion of dividends declared than it was before.

As has been well said by Mr. Taylor in his Law of Corporations, § 801:

> Usually to speak of a "stock dividend" involves in reality a contradiction in terms. A dividend is a distribution of profits. But when a corporation has accumulated profits and declares a "stock dividend," just what the corporation does not do is to declare a dividend. A "stock dividend" is no dividend, no real distribution, either of profits or capital, but merely an increase in the number of shares into which the capital is divided. * * * Should [a bank] issue another share of stock to each shareholder for every share already held by him, it would not distribute a cent. Where, before such issue or "stock dividend," if one so choose to call it, the holder of one share owns one four-thousandth of the entire property, after such issue he will own two eight-thousandths.

In 1868 the city of Louisville owned 40 per cent more shares in the stock of the Louisville and Nashville Railroad Company than it did before, but as the holding of every other stockholder was similarly increased, the city's interest in the undistributed surplus earnings was not changed. Each share represented less of the total surplus than it did before in proportion to the extent to which the stock had been "watered," but the total interest of each stockholder in the surplus remained the same. The surplus earnings remained the property of the corporation after the new stock was issued, just as they had been previously. The corporation, not the stockholders, paid the taxes on each year's surplus earnings as they were carried to surplus account or used for construction, and the stockholders' income was in no way diminished thereby.

It is true that each share of stock represented less property than if the taxes had not been levied and paid, but the same is true as regards the taxes on gross earnings. The act of 1890 did not authorize a claim on account of the diminution of the corporate assets by taxation, but merely a claim for the taxes "deducted from dividends due and payable." The taxes on undistributed surplus were never so deducted, either at the time they were paid or at any subsequent time, and hence were not within the contemplation of the act of 1890.

Even if the appellees' theory that the stock dividend declared in 1867 was a dividend or distribution of earnings theretofore undistributed could possibly stand, this would not give them any right to a refund of the taxes that had been paid upon those earnings. In *Bailey* v. *Railroad Company* (106 U. S., 109) a company had issued to its stockholders certificates that a certain portion of the earnings had been expended in constructing and equipping the road, purchasing property, etc., which certificates were eventually to be either paid out of future earnings or converted into stock at the option of the company. It was held that the certificates so issued constituted a dividend in scrip, but that except in so far as such dividend was declared as of the earnings of the current year, and paid as such, it was not taxable at all, because, as to earnings of prior years, it was declared as of earnings upon which taxes either had been paid or (if the earnings antedated the tax law) had never been due. A dividend of profits which had previously been taxed was not, said the court, subject to taxation as a dividend. In the present case the so-called stock dividend differed to some extent from

the dividend in scrip passed upon in *Bailey* v. *United States*, in that it possessed less of the real character of a dividend, but even if it had been of the same character it would not have been taxable, because the surplus profits which it would have represented had themselves been taxed, including those of 1867. The only taxes which the act of 1890 authorized the Commissioner of Internal Revenue to consider were such as had actually been deducted from dividends *due and payable*, and this because until dividends became *due and payable* they were not taxable under the act of 1864, and therefore no tax could have been deducted from them. Hence, even if the stock dividend of 1868 could possibly be regarded as representing the surplus profits of prior years, the taxes upon such profits, having been paid before that dividend became due and payable, could not possibly have been paid upon it or deducted from it, and could not possibly come within the act of 1890.

The appellees' contention that the act of 1890 authorized the Commissioner to allow a claim for taxes on the railroad company's surplus, because the company had subsequently declared a stock dividend, applies equally well to the taxes on gross receipts. Had the gross receipts not been taxed, the net surplus would have been greater, and in consequence, according to the claimants' theory, the stock dividend would have been greater. In point of fact the appellees took this view at first and presented a claim for $18,240.59 for taxes on gross receipts. (Rec., p. 7.) Their right to recover this amount was precisely the same as their right to recover for taxes on surplus.

Every argument that could be brought to support a claim on the latter account applies equally well to the former, and how the Commissioner could have rejected the former while allowing the latter is inexplicable on any other theory than that of a determination to "draw the line somewhere."

The appellees' contention that the act of 1890 contemplated a claim for taxes on surplus profits afterwards "converted" into a stock dividend is, moreover, untenable on account of the nature and operation of the taxes themselves, as will be readily seen when the object of the act of 1890 and the reason for its passage are considered. The reason for the passage of the act was that the United States had no right to tax the revenues of a municipal corporation by the indirect process of authorizing a railroad company to deduct the taxes levied upon the dividends paid by it from such portion of those dividends as accrued to a municipal corporation as a stockholder; and the object of the act was to put the city of Louisville in the same position that it would have held had the dividends on its stock been excepted originally from the operation of the tax law, as they ought to have been. Had they been so excepted, the city would have received from year to year the same dividend that it did receive plus the amount of the tax which was deducted from it. The total amount of the taxes so deducted constituted the amount by which the revenues of the city had been diminished—the measure of its damages—and the repayment of this tax would put the city back precisely where it would have stood had the

tax law contained the proper exception in favor of municipal corporations, saving only as to the deprivation of its use of the money in the meantime.

Neither this reason nor this object exist in regard to a payment to the city of a part of the taxes upon the railroad company's surplus earnings proportionate to the amount of stock held by the city. Such a payment would not put the city back where it would have stood if no tax had been levied on a portion of the surplus earnings of a company proportionate to the amount of its stock held by municipal corporations. If such an exception from the operation of the tax had been made, the benefit would not have gone to the city, but would have remained with the company, and this simply because the surplus earnings did not go to the city, but remained with the company. Now, conceding for a moment the appellees' wholly untenable propositions that the surplus earnings of a number of years were ultimately "converted into" a stock dividend, and that that stock dividend would have been larger or more valuable had no taxes been levied on a portion of the surplus earnings proportionate to the amount of stock held by the city, what would have been the result? The exemption of any portion of the surplus earnings from taxation would have simply increased the amount of those earnings in the company's treasury, and applicable to the purchase of additional property, the improvement of what it already had, or the extension of its business. Granting that the stock dividend would have been larger or more valuable on that account, the increase would not have inured to the benefit of the city alone, but to that of all the stockholders pro rata, be-

cause the increased amount of surplus due to the partial exemption from taxation would not have constituted a separate fund, but would have been "converted" into a general stock dividend, along with the rest of the surplus, for the benefit of all the stockholders pro rata.

The truth of this statement may be shown by the following illustration: Suppose the railroad company's stock had been $5,000,000 in $100 shares, the appellees holding 10,000 shares, or $1,000,000 of the capital stock; that the surplus, after deducting the taxes paid thereon, had been $1,000,000 in 1865, $500,000 in 1866, and $500,000 in 1867, and that a 40 per cent stock dividend had then been declared. The appellees' share of this new stock would have been worth $400,000 at par, and according to their theory taxes at 5 per cent to the amount of $20,000 would have previously been paid upon it when it was in the shape of surplus. Had the city's proportion of the surplus not been taxed, however, the net surplus, over taxes, would have been $1,010,000 in 1865, $505,000 in 1866, and $505,000 in 1867, or $2,020,000 for the three years, which would have justified a stock dividend of 40.4 per cent, the appellees' share of which would have been worth $404,000, or only $4,000 more than a 40 per cent dividend would have been worth, the remaining $16,000 going to increase the value of that portion of the stock dividend which was distributed among the other shareholders.

Thus it is seen that, by the appellees' own theory of what constituted the stock dividend of 1867, and of the connection between that stock dividend and the taxes levied on surplus in 1865–1867, the claim allowed and

paid them in 1891 exceeded the benefit that would have accrued to them had what they consider their share of the surplus of 1865–1867 never been taxed at all, the excess being measured by the proportion which the amount of the capital stock held by the other shareholders in 1867 bore to the whole stock. By the appellees' own theory of "surplus dividends" logically worked out they have been paid, under the acts of 1890 and 1891, a large percentage more on account of taxes on "surplus dividends" than they lost by the payment of such taxes—a result which demonstrates both the utter fallacy of the theory and of the contention that the act of 1890 authorized the presentation and consideration of a claim on account of taxes upon any dividends of that protean character.

From whatever point of view the act of 1890 is regarded, therefore, the conclusion is irresistible that in allowing a claim for taxes "on surplus profits which were afterwards set apart * * * as the basis of a stock dividend" the Secretary of the Treasury and the Commissioner of Internal Revenue exceeded their jurisdiction under that act, and that to the extent of $17,712.89 (reduced by the Commissioner in 1893 to $14,385.34) their allowance was without warrant of law.

In the argument in the court below it was contended that the following proviso to section 121 of the act of June 30, 1864 (13 Stats., 284), had some bearing on the case:

> *Provided*, That when any dividend is made which includes any part of the surplus or contingent fund of any bank, trust company, savings institution,

> insurance or railroad company which has been assessed and the duty paid thereon, the amount of duty so paid on that portion of the surplus or contingent fund may be deducted from the duty on such dividend.

The proviso is simply this: that when a dividend is declared which includes any part of a surplus upon which a tax has already been paid the tax paid upon such part of the surplus so included shall be deducted from the tax on the dividend; or, in other words, that a dividend shall only be taxed in so far as it distributes profits which have not themselves been already taxed. What sort of dividend does this proviso refer to? Not to a "dividend in scrip," properly understood, because such a dividend is merely a promise of some dividend *in the future*, or to be paid out of future profits, whereas this proviso relates to prior profits. Clearly the proviso can only refer to a dividend declared in whole or in part out of the hitherto undistributed profits of some former half-yearly period (for these taxes were paid half-yearly) upon which profits the tax levied under section 122 had already been paid, and such a dividend can only be a *cash* dividend, because, as already shown, a "stock dividend," as it is called, really distributes nothing to the stockholders which they did not already possess, so that the status of surplus profits can not be affected thereby.

Conceding, however, that the authorities are wholly wrong, and that, in some mysterious way, the stock dividend of 1868 did "include" surplus profits previously taxed, within the meaning of the proviso, how does that affect the present case? By the appellees' theory the

taxes previously paid on such surplus ought to have been deducted from the tax on the stock dividend and the latter tax diminished to the extent of the deduction. Before there could be any deduction, however, the stock dividend must first have been returned for taxation, which the record does not show to have been done, either in 1867 (when the stock dividend was declared) or in 1868 (when the appellees received their new shares) or at any other time. This stock dividend *never was returned for taxation and never was taxed*, and the proviso in section 121 never operated upon it at all.

Making still another concession, for the sake of argument, and admitting that it was unnecessary for the railroad company to make any return of the stock dividend of 1868, because the deduction that would have been made on account of prior taxes on surplus would have left no tax to be levied upon the stock dividend, so that the stock dividend, though not returned for taxation, should be treated as if a tax had been paid upon it, the fact still remains that such tax was never *deducted* from the stock dividend, for the record shows that the shareholders received the full amount of the new shares issued without any deduction whatever. (Rec., 6–7.) That the taxes should have been deducted was a condition of the right to present the claim under the acts of 1890 and 1893.

A fortiori does the foregoing apply to the stock dividend of 1880. The tax law had been repealed nine years before this stock dividend was declared, so that there could be no pretense of any payment of tax upon it or of any abatement of such tax on account of prior

taxes on surplus, under section 121, or of any deduction from such stock dividend of the amount of any tax levied upon it, which deduction was essential to the Commissioner's jurisdiction under the acts of 1890 and 1893. The stockholders received *that* dividend in full, beyond the possibility of controversy.

In point of fact not only has the proviso in section 121 of the act of 1864 no bearing on the case, but neither the appellees nor either of the two Commissioners of Internal Revenue who allowed the claims ever considered that it had, and the claims presented and allowed were entirely different, both in character and amount, from what they would have been had those parties acted on the theory that this proviso was to be considered. The stock dividend of 1867 was 40 per cent of the amount of stock then held, but the record does not show that the surplus profits amounted to just 40 per cent of the capitalization. The appellees did not apply for a refund of taxes deducted from 40 per cent of the par value of the shares of stock held by them, but they applied for and were allowed a refund of taxes deducted from what they considered to be their proportionate share of the surplus profits of three particular years, without any regard to whether that share amounted to 40 per cent of the par value of their stock or not.

As to the allowance made under the act of 1893 of the taxes paid on surplus in 1868–1871, on the theory that they were deducted from the stock dividends of 1880, it is only necessary to say that there was no more legal authority therefor than for the similar allowance in 1890. As to the allowance of 1893, however, the court

below is in error in saying (Rec., 12) that the appellant has not sought to impeach the award. To the extent of the allowance for taxes on surplus in 1868–1871 (viz, $3,248.51) that award is impeached, on the ground that the act of 1893 authorized no such allowance, as the Court of Claims itself held in the Logan County case. The balance of the award was unimpeachable in itself, in that it was for a valid claim, but the appellant's objection to it is that the whole previous allowance for taxes on surplus should have been deducted from the award by the Commissioner before he reported the final balance.

(2.)

Whether a deduction on account of errors of law in a previous settlement could properly be made in the Treasury Department.

This point applies only to that portion of the Comptroller's deduction which related to the allowance of 1890 for taxes on surplus, as corrected by the Commissioner in 1893, viz, the sum of $14,385.26. (Rec., 11.) The ground on which this deduction was made was that which has just been considered above, viz, that the remedial act of 1890 authorized no such allowance. That a deduction can be made on such a ground as well as for mistake of fact is now well recognized. As this court has recently said:

> As a general rule, and on grounds of public policy, the Government can not be bound by the action of its officers, who must be held to the performance of their duties within the strict limits of their legal authority, where by misconstruction of the law under

which they have assumed to act unauthorized payments are made. (*Whiteside* v. *United States*, 93 U. S., 247; *Hawkins* v. *United States*, 96 U. S., 689, and cases before cited.) The question is not presented as between the Government and its officer or between the officer and the recipient of such payments, but as between the Government and the recipient, and is then a question whether the latter can be allowed to retain the fruits of actions not authorized by law resulting from an erroneous conclusion by the agent of the Government as to the legal effect of the particular statutory law under or in reference to which he is proceeding. * * * If in his [the Postmaster-General's] judgment money has been paid without authority of law, and he has money of the same claimant in his hands, he is not compelled to pay such money over and sue to recover the illegal payments, but may hold it subject to the decision of the court when the claimant sues. * * * And in that way multiplicity of suits and circuity of action are avoided. (*Wisconsin Central R. R.* v. *United States*, 164 U. S., 190, 210.)

The above doctrine clearly applies to the present case, although it goes even further, involving apparently even the right to reopen former settlements in certain cases. That right is not involved in the present case, as the settlement was not reopened by either the Commissioner or the Comptroller of his own motion, but at the instance of the appellees, by authority of the statute.

(3.)

Whether the Comptroller could properly make a deduction from such an award as was made in this case.

The Court of Claims has answered this question in the affirmative in the Logan County case as to the deduction

of an allowance first made in 1893 for taxes on surplus, and as regards the mere question of the Comptroller's authority to act, it can make no possible difference that a part of the allowance which he caused to be deducted in the present case was made in 1891. If he had power to act as to the later allowance, he had the same power as to the first, unless the two stood on different grounds, which has been shown not to have been the case.

The award came to the Comptroller's Office through the Fifth Auditor in the regular way, because it was a claim for a refund of internal-revenue taxes alleged to have been illegally collected, a claim which ought to have been presented under section 44 of the tax law of 1864, as amended in 1866, now in force as section 3220 of the Revised Statutes. Not having been presented in time, its presentation was made possible by the act of 1893, but the delay did not change the nature of the claim, and that act expressly declared that section 3220 of the Revised Statutes was "hereby made applicable and available with the force and effect as if protest and demand for payment had been made within the time prescribed" thereby. It is well known that the regular practice of the Treasury was that all claims allowed in whole or in part by the Commissioner under section 3220 went to the Fifth Auditor under section 277, and from him to the First Comptroller under section 269, and there being nothing in the act of 1893 to deprive the Comptroller of his jurisdiction over the claim, Congress must be presumed to have intended that the regular course should be followed and that the Comptroller should

have the same jurisdiction over the claim whenever it should come to him as he would have had had it been presented under section 3220.

The Commissioner's decisions, under section 3220, are in the nature of awards by arbitrators, not to be impeached nor subject to review by the Comptroller for a mistake of judgment or discretion, but impeachable for fraud, *want of jurisdiction*, patent mistake, or other like irregularities. (*Bank of Greencastle* v. *United States*, 15 C. Cls. R., 225; *Nixon* v. *Same*, 18 id., 448, 454; *Ridgway* v. *Same*, id., 707; *Sybrandt* v. *Same*, 19 id., 461; *Frerichs* v. *Same*, 21 id., 16; see also *McKnight* v. *Same*, 13 id., 292, 309.)

Now, the *jurisdiction* to allow a claim on account of taxes on surplus was precisely what the Commissioner lacked under the act of 1893, which only gave him jurisdiction over claims on account of taxes "deducted from any dividends or interest due and payable," and hence his allowance of $3,248.55 on account of taxes on surplus for 1868–1871 was an illegal assumption of jurisdiction, and it was the Comptroller's duty, as well as within his power, to correct the error by deducting the amount erroneously allowed. (*Seat* v. *United States*, 18 C. Cls. R., 458.)

It is equally beyond question that when the Comptroller deducted from the allowance of 1893 so much of what had been paid in 1891 as the Commissioner had not himself already deducted, the former did not reopen the settlement of 1891. When the allowance of 1893 came before him, that settlement, as has been shown above, had

already been reopened, and the allowance then made, merged in that of 1893, so that the claims of 1891 and 1893 had practically become a single claim, upon which there had been a payment on account. The question of the Commissioner's jurisdiction to allow a claim for taxes on surplus therefore came before the Comptroller as properly, in regard to those claims for taxes on surplus which had been allowed in 1891 and paid, as in regard to those which had been rejected in 1891 but subsequently reconsidered and allowed in 1893, and the Commissioner having been equally without such jurisdiction on both occasions, the Comptroller's action was equally proper as to both allowances.

The case of *United States* v. *Kaufman* (96 U. S., 567) and *United States* v. *Savings Bank* (104 U. S., 728) furnish no argument against the authority of the Comptroller in cases of this sort; they merely confine his authority within its proper limits. The question in those cases was whether or not the Court of Claims had jurisdiction after the Comptroller had decided the matter, and it was held that it had. In the Kaufman case it was also held that until the decision of the Commissioner of Internal Revenue in favor of a claim was impeached in some appropriate form, the liability of the Government was conclusive; that is to say, that the mere fact of a disallowance by the Comptroller did not shift the burden of proof, and that "the affirmative of the impeachment [was still] upon the Government."

In both of those cases the court concurred in the views of the Commissioner, not in those of the Comptroller;

but in the Savings Bank case the court below, whose decision was affirmed, was most careful not to limit the Comptroller's authority further than to say that his refusal to authorize the payment of a claim "does not finally settle the legal rights of the claimant," adding the significant words, "It is his duty to refuse to pass a claim which he considers unjust and impeachable in law, and thus to leave the claimant to his remedy in the proper court." (16 C. Cls. R., 352.)

It appears, therefore, that both of the allowances for taxes on surplus earnings of the railroad company were illegally made, and hence that the first one (that of 1891) could properly be deducted from any new allowance subsequently made, while the second (that of 1893) could be stopped at any time before actual payment, and it further appears that the Comptroller had power to act in the matter. Hence, whether the payment of 1891 be held to be of the same character as ordinary Treasury payments, or whether the act of 1893 be held to have specially authorized a reopening, on the appellee's motion, of the settlement of 1891, in either event the Comptroller's action in deducting from the award of 1893 the net illegal allowance of 1891, as well as the illegal allowance of 1893, was correct, and it is submitted that the judgment of the court below be reversed.

CHARLES C. BINNEY,
Special Attorney,

L. A. PRADT,
Assistant Attorney-General,
for Appellant.

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In the Supreme Court of the United States.

October Term, 1897.

THE COMMISSIONERS OF THE SINKING Fund of the County of Logan and the County of Logan, Kentucky, appellants,

v.

THE UNITED STATES.

No. 167.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S BRIEF.

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STATEMENT OF THE CASE.

Between October 1, 1862, and July 6, 1872, the county of Logan, Ky., held stock of the Louisville and Nashville Railroad Company, which company paid interest regularly on its bonds, and also from time to time cash dividends on its stock, retaining, however, in each of the years 1865 to 1871, inclusive, an undistributed surplus. (Rec., 7.) The act of June 30, 1864, section 122

(13 Stats., 284), imposed a tax upon all the earnings of railroad companies, as follows:

> Any railroad * * * company indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due and payable to its stockholders as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a duty of five per centum upon the amount of all such interest, or coupons, dividends, or profits, whenever the same shall be payable, and said companies are hereby authorized to deduct and withhold from all payments on account of any interest or coupons and dividends due and payable as aforesaid the duty of five per centum.

The act of July 13, 1866 (14 Stats., 138), amended the section from which the above is taken, but not in any way affecting the present case. Section 44 of the act of June 30, 1864 (13 Stats., 239), also amended by the act of July 13, 1866, and subsequently reenacted as Revised Statutes, section 3220, provided for the repayment of all taxes erroneously or illegally assessed or collected, but the act of June 6, 1872, section 44 (Rev. Stats., sec. 3228), limited the time for presenting applications for repayment to one year in the case of taxes already collected, and two years in the case of those to be thereafter collected. The railroad company paid the taxes required

by these statutes, and made the deductions from interest and cash dividends as authorized thereby, but in so doing it made no exception in the case of interest or dividends payable to public or municipal corporations. The fact that such taxes were paid upon the interest and dividends due the appellants, and that such deductions were made, was not known to the appellants until after the statutory time for applications for a refund of the taxes so deducted. (Rec. 7.)

By a resolution of the directors of November 16, 1867, the railroad company increased its capitalization by 40 per cent, distributing the new shares of stock among the stockholders in proportion to their holdings of the old stock. (Rec. 7–8.)

The act of February 25, 1893 (27 Stat., 447), directed the Secretary of the Treasury and the Commissioner of Internal Revenue to audit and adjust the claims of the appellants and others "for internal-revenue taxes collected on railroad dividends on stock, and on interest on railroad bonds owned" by them in certain companies "to the extent that such taxes were deducted from any dividends or interest due and payable to such boards respectively and which have not been heretofore refunded, * * * any statute of limitations to the contrary notwithstanding." The act also provided that "the amounts, when ascertained as aforesaid and not heretofore refunded, shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year."

Under this act the appellants presented a claim to the Commissioner of Internal Revenue for a refund of $17,606.14, which amount was made up as follows:

Tax on cash dividends	$9,645.47
Tax on surplus prior to 1868	6,747.89
Tax on surplus, 1868 and subsequently	1,212.78
Total	17,606.14

It appearing that the county of Logan had sold, May 3, 1879, all its stock in the Louisville and Nashville Railroad Company, the claim for taxes on surplus profits in 1868 and thereafter was subsequently withdrawn. (Rec., 8.)

The Commissioner of Internal Revenue recommended an allowance of $15,397.75, being $9,533.54 on account of taxes on cash dividends and $5,864.21 on account of taxes on surplus, on the theory that this surplus had been converted into the stock dividend of 1867, above referred to. The Secretary of the Treasury approved the allowance and it was formally made. The schedule and the papers in the case were referred to the Fifth Auditor of the Treasury and passed and approved by him. They then went before the Comptroller, and he refused to issue a warrant for the amount or direct the payment of the same, holding that the allowance of the claim for taxes paid on surplus was illegal and unauthorized. He thereupon directed the payment of $9,533.54, and refused to pay any other or further sum. This suit was brought to recover the sum of $5,864.21, which was rejected by the Comptroller. (Rec., 9.)

The court below dismissed the petition, whereupon the claimants appealed. (Rec., 17.)

BRIEF OF ARGUMENT.

Before proceeding to the argument of this case, it is desirable, in order to prevent any misunderstanding, to refer particularly to some of the statements made in the findings of fact and to explain certain apparent inconsistencies between them.

The first finding states that from 1862 to 1872 the Louisville and Nashville Railroad Company "paid cash dividends from time to time, retaining, however, in each of the years 1865 to 1871, inclusive, an undistributed surplus." Also that the company "paid taxes to the United States upon its dividends and upon its surplus earnings, the taxes on the former being deducted from the amount which would otherwise have been paid in full to the stockholders." The word "dividends" in the sentence just quoted above evidently refers to the cash dividends mentioned in the preceding sentence, no other kind of dividends being mentioned in this finding. The sample of a tax return made by the railroad company, as given in the same finding, mentions the amount of dividend declared and the tax thereon, and also the amount of the profits over the dividend declared and the tax upon the same. It is clear that this return relates exclusively to the tax on a cash dividend and the tax on surplus profits over and above that cash dividend.

The second finding relates to an increase of stock of 40 per cent made by resolution of the directors of the railroad company and distributed among the stockholders. The resolution of the directors, which is given in full, provides for "an increase of the stock of 40 per cent," and does not refer to the payment of any tax upon such

increase of stock or any deduction from such increase of stock on account of any tax. Furthermore, the resolution does not state that this "increase of stock of 40 per cent" is a distribution to the stockholders of the surplus profits previously undistributed, nor does it state that the amount of the new stock has anything to do with the amount of undistributed profits. The only reference whatever in the resolution to the earnings of the company concerns future increases of stock, and as to them only to the extent of providing that such increases shall be made whenever the net annual earnings of the company shall be sufficient to pay interest accruing upon the indebtedness of the company, provide a sinking fund sufficient to pay the bonded debt of the company as it falls due, and to pay 6 per cent on the stock. The amount of increase of the stock would, therefore, seem to have been determined with reference to the capacity of the net annual earnings to pay a dividend on that stock, rather than with reference to the amount of surplus profits in hand.

The same finding states the par value of the capital stock in 1867 as $5,638,600, and the par value of the stock dividend thereon as $2,131,500. As 40 per cent of $5,638,600 is $2,255,440, there would seem to be a patent error in the court's statement as to the par value of the stock dividend in 1867 to the extent of $123,940, unless in point of fact a portion of the stock was held by the corporation itself, as is often the case, so that the distribution of the stock dividend to the stockholders did not require the issue of new stock to the full extent of 40 per cent upon the total capitalization. Certainly the difference between

$2,255,440 and $2,131,500 can not be accounted for by any payment of tax, because, first, it does not appear that any tax was paid which decreased the rate of the stock dividend below 40 per cent, and, further, the difference in the amount, $123,940, is considerably more than 5 per cent (the tax rate in 1867) upon $2,255,440.

The third finding states that the county of Logan made a claim in 1893 for a refund of the tax on cash dividends and on surplus. This shows clearly that the claim was not one for refund of any tax paid on a stock dividend.

The fourth finding states that the Commissioner of Internal Revenue "recommended the allowance of said sum." The words "said sum" can not refer to the total amount of the claim presented by Logan County, as given in the third finding, because that finding states that a portion of that claim was withdrawn. In using the words "said sum" the court below has evidently overlooked the fact that it had not previously stated what precise amount was found by the Commissioner on audit and adjustment of the claim of Logan County; but this amount is shown by the Commissioner's letter of September 28 to the Secretary of the Treasury, a copy of which is annexed to the petition in this case (Record, pp. 3 and 4), to have been $9,533.54 on account of taxes on dividends, and $5,864.21 on account of taxes on surplus, making an aggregate of $15,397.75, which is evidently the amount referred to in Finding IV as "that sum." Finding IV also states that the Comptroller held that "the allowance of the claim for taxes paid on

account of stock dividends was illegal and unauthorized." The allowance referred to obviously means the allowance which the Commissioner stated that he made on account of "taxes on surplus," it appearing that the theory on which the latter allowance was made was that the surplus was converted into a stock dividend, but not that any tax had ever been paid on the stock dividend as such.

The fifth finding purports to recite what had taken place in 1890-91 in regard to a claim of the city of Louisville, which was paid by the act of June 30, 1891 (26 Stats., p. 867). The propriety and finality of that payment comes before this court in case No. 105, but it is submitted that the greater part, if not all, of this finding is absolutely irrelevant in the present case. The first part of the finding, including the Commissioner's letter of January 24, 1891 (Rec., 9-10), is plainly irrelevant, because it does not appear that these statements and this letter were ever communicated to Congress at all, at least in the shape in which they appear here; while the relevancy of the latter portion (viz, the communications actually submitted to Congress, Rec., 10-11) is at best very doubtful, as it does not appear that Congress had those communications in mind when the act of February 25, 1893 (under which the present case arises), was passed, or that its action in passing that act was in any way influenced by the statements made to it in 1891. This finding may therefore be disregarded.

Certain statements which appear in this finding should, it is submitted, be disregarded on another ground, namely, that they are conclusions of law and not statements of

fact. The finding says that cash dividends were declared upon this stock; that "there was also a large amount of undistributed surplus belonging to the city upon which stock or scrip dividends were issued," and "these cash dividends and the undistributed surplus which was converted into stock or scrip dividends were held by the officers of the Government to be subject to taxation, and taxes were assessed and collected according to the terms of the statute in force at the time of the respective collections." The words "there was also a large amount of undistributed surplus belonging to the city" involve not only a conclusion of law as to the ownership of that surplus, but a conclusion which is absolutely at variance with the law as laid down by the court below in this case. The opinion states (Rec., 16):

> The controlling fact in the case is that the undistributed profits of the company were *not* the property of the claimant when the tax on them was paid.

If that was true in law of the county of Logan, it was equally true of the city of Louisville, and hence it is clear that this statement must have appeared in the finding through inadvertence on the part of the court below. The statement in the finding that the undistributed surplus belonged to the city, as also the reference to the surplus as having been converted into stock dividends, are, moreover, inconsistent with the findings of fact made by the court below in the case of the city of Louisville (case No. 105), which merely stated that there was a surplus and that there were stock dividends in 1867 and

1880, but did not state that there was any necessary connection of any kind between the two.

In explanation of the peculiarities of Finding V, it is submitted that a reference to the record in the court below, if such reference can properly be made by this court, will show that the first part of this finding was a part of the statements of fact which the appellants' counsel requested the court to make. The court having found, with sufficient precision, the facts in regard to the claim of Logan County, and having decided against that claim, evidently thought that a finding as to facts relating exclusively to the claim of the city of Louisville was not of very special importance, and while it was willing to make a finding in regard to those facts, it did not consider the precise language used as carefully as it would otherwise have done.

It appears, therefore, from these findings as a whole, that the taxes with which the court is concerned in this case were those upon cash dividends and upon surplus profits only; that no taxes were paid upon the stock dividends which figure in this case, and that no deduction was made therefrom on account of the payment of any tax, but that the Commissioner of Internal Revenue in making his allowance acted on the theory that the payment of taxes on surplus profits was equivalent to a payment of taxes on a subsequent stock dividend and a diminution of that dividend to that extent.

The questions as to whether a tax on surplus profits under the act of June 30, 1864, should be regarded as a tax on a stock dividend, and as to whether the act of

February 25, 1893, authorized the allowance of any claim on account of taxes paid upon undistributed surplus having been fully considered in pages 32 to 52 of the brief in the case of the *United States* v. *The Commissioners of the Sinking Fund of the City of Louisville*, No. 105, that argument need not be repeated here. It is only necessary to consider certain contentions made by the appellants' counsel in his brief in the present case.

THE CONTENTION THAT THE SURPLUS WAS DISTRIBUTED.

Appellants' counsel states (brief, p. 13) that "this surplus fund was *expressly* distributed in the form of a stock dividend." There is absolutely nothing in the record from one end to the other to warrant this statement. The only *evidence* as to the stock dividend is the resolution of the directors of the railroad company of November 16, 1867 (Rec., 8), and this resolution does not refer at all to the surplus profits previously earned. It declares that in the future the stock shall be increased by 10 per cent whenever the net annual earnings shall make it possible to pay a dividend of 6 per cent upon the whole amount of stock, including such increase. This declaration of the future policy of the company is important as showing how the directors regarded a stock dividend. They intended to apply increased net annual earnings to the payment of dividends upon an increased capitalization, a policy that would effectually prevent any substantial additions to the property represented by the capitalization. In other words, the stock was to be

"watered" whenever the earnings admitted of a dividend on the "water" as well as on the stock previously existing. The amount of "water" was to be measured by the earning capacity of the company, not by the amount of its surplus, and hence that surplus was in no sense to be distributed by the addition of the "water" to the stock. Undoubtedly a stock dividend provides a means of distributing *future* earnings, but only in the form of cash dividends on an increased capitalization. It can not distribute past or present earnings, and it does not appear that the directors of the railroad company ever supposed that it could.

In support of his statement that "this surplus fund was *expressly* distributed in the form of a stock dividend," appellants' counsel cites, first, the statements of Commissioner Mason and Acting Secretary Nettleton, as also those of Acting Commissioner Wilson and Acting Secretary Hamlin (see appellants' brief, p. 20), statements which are merely evidence of the opinions held by those gentlemen, but are in no sense evidence of the facts. Secondly, counsel cites a part of the fifth finding (appellants' brief, 13, 14, 20), containing the words "undistributed surplus belonging to the city upon which stock or scrip dividends were issued," "undistributed surplus which was converted into stock or scrip dividends." It has already been stated that these parts of the finding are not statements of fact, but conclusions of law, and hence must be disregarded, whether inadvertently made, as they manifestly were, or not.

Apparently the sample portion of a tax return (appellants' brief, p. 15), is also referred to in support of the

same statement that "this surplus fund was *expressly* distributed in the form of a stock dividend," but in point of fact it makes against that statement. This is manifestly not a complete return, being without caption, date, or signature. It is merely an extract relating to two matters, the cash dividend and the "profits *over* dividend," and to the tax of 5 per cent which was levied upon each. The words "5 per cent of dividend retained as excise tax" refer to the sum of $11,637.62 (the tax on a cash dividend) only, and have no reference to the sum given on the second line ($74,265.78), which represents the tax on the surplus profits, and is put in the same column as the tax on the dividend merely for the purpose of addition, in order to reach a total. Appellants' counsel assumes that the words "5 per cent of dividend retained as excise tax" apply to the whole column and to every sum that appears therein, and indicate that the tax upon "profits *over* dividend declared" was "retained" from some "dividend" paid to the stockholders. It should not take much penetration to see that a sum of money can not be at one and the same time a dividend and "profits *over* dividend," or that the last line of this extract has nothing to do with taxes on dividends, and that the only dividends to which the extract relates are cash dividends, from which alone, as far as this extract is concerned, a tax was retained, and to which alone, as far as this extract shows, the act of February 25, 1893, related. Hence where counsel says "the whole dividend was ours and we received only 95 per cent of it" (appellants' brief, p. 16), this can, in truth, refer to a cash dividend only.

THE CONTENTION AS TO THE PRACTICE OF THE RAILROAD COMPANY.

Appellants' counsel states that—

> The practice was, as has been frequently set forth, for the railroad, whenever it proposed to declare a stock dividend, to set apart a certain amount out of their net earnings, which amount included the 5 per cent tax. After deducting the tax from the amount set apart, the balance was distributed into [in?] a stock dividend. The stockholder, and not the railroad, suffered the diminution. * * * The stock dividend by its express term covered the surplus that had accumulated. (Appellants' brief, 16–17.)

If the word "cash" were substituted for the word "stock" in the above passage, the statement (except the last sentence) would be true; but as it stands it both flatly contradicts the record and describes an impossibility. Not merely is there no evidence that "a certain amount out of their net earnings" was ever set apart for distribution as a stock dividend, or that any tax was ever deducted from the amount so set apart, but the resolution of November 16, 1867, (Rec., 8) shows clearly that such was not the practice. The resolution contains not one word about setting apart a dollar of the net earnings, but it shows that the practice was to increase the capitalization whenever it appeared that the net earnings sufficed to pay a 6 per cent cash dividend on the capitalization as increased, and there was no deduction from such increase of capitalization, or stock dividend, on account of any tax. No such deduction was in fact

possible, because no tax was paid on the stock dividend, and the taxes on surplus were paid during a period of three years or more before the stock dividend was declared. After a tax has once been paid it can not be "set apart" and deducted.

THE CONTENTION AS TO SECTION 121 OF THE ACT OF 1864.

Appellants' counsel states that the act of 1864 required all stock dividends to be taxed, and provided (by section 121) that when a stock dividend included any part of the surplus or contingent fund, the tax previously paid on such surplus should be deducted (appellants' brief, p. 17); but even conceding that stock dividends come within the letter of the act of 1864, it does not follow that every stock dividend has been returned for taxation and the proper tax paid thereon, and hence in any claim for a refund such return and payment must be proved. In the present case there is no such proof, and the findings indicate that no such return or payment were ever made. The railroad company evidently considered that as the stock dividend neither added to nor took away anything from its property or its stockholders' property, it was unnecessary even to enter it on the tax return.

The effect of the proviso in section 121 of the act of 1864 is considered in the brief for the United States in case No. 105 (pp. 48–51), and it is only necessary to add that even if this proviso applied to stock dividends it would not have obviated the need of returning those dividends for taxation, with a statement of the precise amount of tax to be deducted, and it would not now

obviate the need of proof of such return and deduction. The need of these can not be obviated by suggesting that a tax on surplus and a tax on a stock dividend "are in the eye of the law one and the same." (Appellants' brief, p. 18.) Unless the collector had the opportunity of seeing whether the tax paid on the surplus equaled in amount the tax due on the stock dividend, he would be unable to know whether they were "in the eye of the law one and the same" or not.

THE CONTENTION AS TO THE HISTORY OF THE ACTS OF 1890 AND 1893.

Appellants' counsel contends (brief, pp. 21–24) that the history of the passage of the acts of 1890 and 1893 shows that Congress intended to authorize a refund of taxes paid on surplus. He says: "While the first bill in 1890 was pending, and before its passage, both the House and Senate were expressly informed of the exact nature of the transaction," and in support of this statement he refers first to a report made to the Senate in 1890, upon the petition of the city of Louisville, for a refund of the taxes paid on its dividends. This report is *not in the record*, and the mere fact that it is contained in a public document (Sen. Rept. No. 640, 51st Cong., 1st sess.) can not make its contents the subject of judicial notice. This court will take notice of the official publication of such a document, so as to dispense with proof of the genuineness of the papers it contains, but it will not take judicial notice of them unless they are such as are entitled to judicial notice wherever they are found. There is just one part of the report which can be judicially noticed, viz,

the findings and judgment of the circuit court for the district of Kentucky in *Commissioners of Warren County* v. *Speed*, and these, through some inadvertence, appellants' counsel has so misquoted as to totally alter the meaning.

The findings as printed.	*As quoted in appellants' brief.*
(3) That the county of Warren, at the time of the several payments, owned stock in the said railroad company subscribed thereto by said county and paid for * * * and also other stock issued to said county by said railroad company for dividends which were paid by and in the stock so issued to said county, and the above amounts were paid as the taxes claimed to be due to the said United States on the dividends declared by said company on the stock of said county in the said railroad company.	In the judgment of the court, the taxes in controversy were spoken of as "upon other stock issued to said county by said railroad company for dividends which were paid by and in the stock so issued to said county."

The finding merely states that Warren County had acquired stock of the railroad company in two ways, viz, by original subscription and by stock dividends, and that certain sums were paid as taxes on dividends declared on such stock, both the original and that afterwards acquired by stock dividend. The finding does not state that any of these taxes had been paid on stock dividends, but counsel quotes it as stating that the taxes were "upon other stock issued * * * for dividends which were

paid by and in the stock so issued," i. e., upon stock dividends.

The finding in the Warren County case therefore merely shows that Congress was informed, in a rather round about and inferential way, that the railroad company had declared stock dividends, but not that they had been taxed, or that taxes had been deducted from them. The rest of the report, even if it could be judicially noticed, would show no reference to stock dividends whatever.

In support of his contention as to the intention of Congress in the act of 1893, appellants' counsel cites certain reports not in the record and containing, apparently, nothing which can be judicially noticed. Even if they could be judicially noticed, however, they would be worth very little. The court has repeatedly held that the debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, and for the reason that "it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of the individual members thereof." (*United States* v. *Freight Assn.*, 166 U. S., 290, 318, and cases there cited.) It can make no difference in this respect whether the opinions of individual members are expressed in speeches or in reports. Conceding that Congress may have been informed that certain counties wished to make claim for a refund of taxes on stock dividends, and that those counties were named in the act of 1893, it does not follow that Congress undertook to decide in favor of claims

of that character. All that it did, as the court below has held, was to remove the bar of the statute of limitations of claims to recover taxes, but it left it to the officers of the Treasury and to the courts to decide whether the claims themselves were entitled to be allowed.

THE CONTENTION AS TO THE UNCONSTITUTIONALITY OF THE INCOME TAX.

The final contention of appellants' counsel is that the tax imposed by section 122 of the act of June 30, 1864, was unconstitutional under the ruling in *Pollock* v. *Farmers' Loan and Trust Co.* (158 U. S., 601), so that no money acquired by the United States under that act can lawfully be retained by it, except where claims are barred by some statute of limitation. Even if this contention were sound, it could not affect the present case, because the tax was not paid by the appellants, either directly or indirectly, but was assessed against the property of the railroad company and paid by it, and should therefore be refunded to it alone, if a refund were required.

It is therefore submitted that the judgment of the court below should be affirmed.

CHARLES C. BINNEY,
Special Attorney,
L. A. PRADT,
Assistant Attorney-General,
for Appellee.

No. 105.

Reply Brief of Atty. Gen. & Binney & Co. for Appellant.

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APPELLANT'S BRIEF IN REPLY.

THE FACTS IN THE CASE.

The appellant's original brief contains what is believed to be a plain, impartial statement of the facts in this case as they appear in the record. Counsel for the appellees has seen fit, however, to present his own statement of the case, differing in some important particulars from that made in the appellant's brief, and therefore calling for some attention.

At the foot of page 1 of the appellees' brief there is a reference to the "undistributed surplus which was converted into stock or scrip dividends." As the findings of the court below do not state that any undistributed surplus was converted into stock or scrip dividends, the statement quoted would be unwarranted even if it were a statement of fact. It is submitted, however, that it is clearly a conclusion of law, and for that reason also wholly out of place in a statement of facts. Furthermore, as the language of counsel above quoted immediately precedes the words "were held by the officers of the Government to be subject to taxation," it necessarily suggests the inference that the officers of the Government held that the undistributed surplus was converted into stock or scrip dividends and was taxable in that form—an inference wholly at variance with the facts of the case, as it appears the surplus was taxed before the stock dividends were declared. As the same statement as to undistributed surplus precedes by but little space the statement that "before paying over the dividends or interest the taxes were taken out and the city received the dividends or interest diminished by the amount of taxes so paid, and its revenues were lessened to that extent" (appellees' brief, p. 2), the inference is suggested that the city received its stock dividends diminished by the amount of the taxes paid upon them—an inference unwarranted by the facts as found by the court. Similar references to taxes paid on "stock dividends" and on "undistributed surplus or stock dividends," meaning, apparently, that these two expressions are equivalent, are found all through the

appellees' statement of the case, and are in every case unwarranted by the statement of facts made by the court below; but it is unnecessary to point out every instance.

On page 6 of the brief appellees' counsel states:

> The claim of $3,008 for refund on account of taxes paid on stock dividends was not included or considered in the adjustment made under the act of 1890, but arose out of a stock dividend declared subsequently to the one which had been at that time considered and allowed.

On page 17 appears this further statement:

> The item of $3,008.40 arose out of a 100 per cent stock dividend made in 1880. It has nothing whatever to do with the $17,000 allowance made in 1891. That was based solely on the stock dividend of 40 per cent which was declared in 1867 and 1868. It is doubtful whether the $3,008.40 item was ever presented in 1890, and whether it was or not, it was not considered by Commissioner Mason at all.

If the words "included," "considered," and "presented" are used in their ordinary meanings, these statements are at variance with the facts found by the court below. The court states (Rec., 8, 11):

> He [the Commissioner, in 1891] refused to allow the claim on account of taxes paid on gross receipts and on interest and so much of the claim on account of taxes on undistributed surplus as concerned the taxes levied in 1868, 1869, 1870, and 1871. * * * The claim [of 1893] for the amounts stated to have been collected from the railroad company on account of taxes levied on its undistributed surplus in 1868 to 1871, amounting to $3,008.40 in all, had been included in the claim presented in 1890, but, as stated in the fifth finding, had not been allowed.

It is true that the claim of $3,008.40 on account of taxes on surplus had not been "included" in the allowance made under the act of 1890, but it certainly was both "included" and "considered" in the adjustment—i. e., the audit and settlement of the claim made in that year.

The appellees' counsel further states (brief, p. 9):

> It was not denied that taxes had been collected upon such dividends [the stock dividends] and that the city had been a loser to that extent; neither was it contended that the tax collected [refunded?] in 1891 had any relation to the claim for refunding taxes paid upon interest or bonds in 1893.

The above statements are made with reference to the Comptroller's action in 1893 in refusing to approve a certain part of the allowance made by the Commissioner and the Secretary. There is nothing in the record to warrant the assertion that the Comptroller did not deny that taxes had been collected upon stock dividends and that the city had been a loser to that extent; but on the contrary, as the record indicates that no taxes had ever been collected upon such dividends, the inevitable presumption is that the Comptroller did deny that there had been such a collection. While it is true that the claim which was paid in 1891 had no relation to that portion of the claim of 1893 which related to taxes paid upon interest on bonds, yet as the record states explicitly that the claim made in 1893 for taxes on surplus was one that had been rejected in 1891, it is to be presumed that whatever the Comptroller contended, it was in accordance with that state of facts.

APPELLEES' CONTENTION IN REGARD TO A REOPENING.

The court below based its decision in this case on the sole ground that the act of June 30, 1891, appropriated a specified sum of money to be paid to a designated party, so that no portion of the money so directed to be paid could either be withheld or be recovered back after payment, without further Congressional action. The appellees' counsel, however, scarcely attempts to sustain the position of the court below, but makes his chief argument on the theory that the Comptroller in 1893 undertook to reopen a settlement made by his predecessor. In this connection counsel draws a distinction between the action of the Comptroller and that of the Commissioner, who in 1893 reexamined the settlement of 1891,

> not for the purpose of readjudicating or reversing what had been done, but simply to ascertain whether the present claim was included in the former allowance. In making that examination he discovered some errors in calculation, which he corrected. This ended his work. (Appellees' brief, p. 15.)

Counsel's argument is that while it was perfectly proper for the Commissioner to reexamine the settlement of 1891 and correct errors of fact therein, it was not permissible for the Comptroller to correct that settlement on account of errors in law. In support of this argument the case of *United States* v. *Bank of the Metropolis* (15 Pet., 114) is cited. It is submitted that this argument is wholly irrelevant, and is based on an erroneous view of the facts of the case. If the court below was right in holding that the appropriation of 1891, to use the court's own language, "expresses no

intent to disturb what has been done," so that no portion of the payment made thereby could be set off in a future settlement, for errors either of fact or of law, without further authority of Congress, it was just as much beyond the power of the Commissioner to correct errors of fact as it was beyond that of the Comptroller to correct errors of law. The question is, therefore, not whether the Comptroller had power to reopen a settlement made in the time of his predecessor, but whether the payment of 1891 could afterwards be made the subject of set-off for any reason whatever. In comparing the action of the Commissioner and the Comptroller in 1893, appellees' counsel refers (brief, pp. 16–17) to an alleged letter of the Commissioner. It is submitted that this letter is not in the record now before this court, and that it is not the subject of judicial notice, not being an executive act which has the force of law. Had appellees' counsel seen fit to request the court below to incorporate this letter in its findings, and that request had been acceded to, the letter could properly have been considered by this court, if relevant, but as it is, there is no warrant for considering it.

The contention of appellees' counsel (brief, pp. 17 and 18) that "there was no effort by the city of Louisville to reverse or modify the decision of 1891" is based on a failure to realize the meaning of the plain language of the finding as to the fact that the claim made in 1893 for taxes or surplus to the amount of $3,008.40 had been presented and rejected under the act of 1890. It has been sufficiently shown before that counsel's statements are at variance with the record, and it is only necessary

to add that the facts shown by the record constituted a reopening of the settlement of 1891 by the appellees themselves, whether such a reopening was permissible or whether, as necessarily follows from the view taken by the court below, it was not permissible. Of course, if the view of the court below is correct, the action of the appellees in 1893 in reopening the settlement of 1891 was a nullity, and the changes in that settlement made by the Commissioner were likewise nullities, and so of the Comptroller's action; but if the appellees had a legal right in 1893 to re-present a claim rejected in the settlement of 1891, and thereby secure a reopening of that settlement, then undoubtedly the Comptroller can not be charged with having himself reopened a settlement made by his predecessor, whether in point of fact he had, under the circumstances of the case, power to reopen it or not.

The authority of the Comptroller under the facts of this case is sufficiently considered in appellants' former brief (pp. 52 to 57), and certainly the Comptroller's authority, existing as it does by virtue of a statute, can not be affected by the fact that a previous Solicitor of Internal Revenue did not happen to agree with him. Moreover, the Solicitor's opinion, quoted by appellees' counsel (brief, p. 11), is not in the record, and is scarcely to be regarded as the subject of judicial notice. If, however, it could be judicially noticed, the court would also take notice of the fact (and would attach to that fact its proper significance) that the appellees' counsel was himself the Solicitor, whose opinion he now cites as conclusive against the Comptroller.

THE CONTENTION THAT THE CLAIM OF $17,633.43 CAN NOT BE A SET-OFF.

Appellees' counsel contends that, apart from anything else, the Comptroller had no right to refuse payment of that portion of the allowance of 1893 to which he objected, and the appellants can have no right to retain the money, because the tax imposed by the act of June 30, 1864, section 122, being an income tax, not apportioned among the States with regard to their population, was unconstitutional under the decision in *Pollock* v. *Farmers' Loan and Trust Company* (158 U. S., 601). Whether that decision applies to the tax imposed in 1864 or not, it can not affect the present case. That portion of the allowance of 1893 which the Comptroller refused to approve related, it is submitted, to taxes paid by the Louisville and Nashville Railroad Company upon its own property, and not to taxes paid by the appellees upon any property of theirs, either directly or indirectly. If the tax was unconstitutional, the only person to whom it could possibly be refunded was the party that paid it, and the plea of its unconstitutionality can not be set up for the benefit of a party who did not pay it.

CHARLES C. BINNEY,
Special Attorney,
L. A. PRADT,
Assistant Attorney-General,
for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 105.

THE UNITED STATES, *Appellant*,

v.

THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, AND THE CITY OF LOUISVILLE KENTUCKY.

Brief for the Appellees.

STATEMENT OF THE CASE.

During the period from October 1, 1862, to July 6, 1872, the City of Louisville, Kentucky, was the owner of a large amount of the stock and bonds of the Louisville and Nashville Railroad Company. Cash dividends were declared upon this stock. There was also a large amount of undistributed surplus belonging to the city, upon which stock or scrip dividends were issued to the city. There also accrued a large amount of interest upon the bonds of the company. These cash dividends, the undistributed surplus which was converted into stock or scrip dividends, as well as the interest upon the bonds,

were held by the officers of the Government to be subject to taxation under the Internal Revenue laws of the United States, and taxes were assessed and collected at the rate of three per cent. upon some portions, five per cent. upon other portions, and two and one-half per cent. upon other portions, according to the terms of the statute in force at the time of the respective collections. The taxes so collected were paid by the railroad company and the amounts were deducted by the company from the sums due and payable to the City of Louisville; that is to say, before paying over dividends or interest, the taxes were taken out and the city received the dividends and interest diminished by the amount of the taxes so paid, and its revenues were lessened to that extent. These taxes were paid by the railroad company without the knowledge of the Fund Commissioners of the City of Louisville, and when they became aware of the fact, the time in which an application for a refunding of the taxes should be made had expired.

On the 16th of June, 1890, Congress passed an act for the relief of the Fund Commissioners of the City of Louisville, which is in the following words:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the Treasury and the Commissioner of Internal Revenue be, and are hereby, authorized and required to audit and adjust the claim of the Board of the Sinking Fund Commissioners of the City of Louisville, Ky., for Internal Revenue taxes on dividends on shares of stock owned by said board for said City of Louisville, in the Louisville and Nashville Railroad Company to the extent that such taxes were deducted from any dividends due and payable to said board, and to pass upon said claim, and render judgment thereon in the same manner and with the same effect as if said claim had been presented and prosecuted within the time limited and fixed by law."

On the 25th day of September, 1890, the Sinking Fund Commissioners of the City of Louisville, made application for the refunding of taxes in the following amounts:

For tax on gross receipts	$18,240 59
For tax on cash dividends	24,801 14
For tax on undistributed surplus or stock dividends.	21,721 29
For interest	815 30

The foregoing claims were examined by the Secretary of the Treasury, and the Commissioner of Internal Revenue, and upon such examination they found that taxes had been deducted from cash dividends due and payable to said Board of Sinking Fund Commissioners to the amount of $24,801.14, and that taxes had been deducted from the undistributed surplus or stock dividends belonging to the City of Louisville, and due and payable to said Fund Commissioners to the amount of $17,712.80. They allowed said sum of $24,801.14 on account of taxes paid on cash dividends, and said sum of $17,712.80 on account of taxes paid on stock dividends. But they refused to allow the claim for taxes paid on gross receipts, and the claim for interest.

The two claims allowed amounted to the sum of $42,514.03. On the 14th day of February, 1891, the claims so allowed were submitted to Congress, as will appear by the following correspondence:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETAY,
"*Washington, D. C., February* 14, 1891.

"SIR: Referring to an act for the relief of the board of commissioners of the sinking fund of the city of Louisville, Ky., approved June 16, 1890 (26 Stat., p. 157), which directed the audit and adjustment of the claim of said board of commissioners for internal revenue taxes, etc., I have

the honor to inclose copy of a report made by the First Comptroller in the case, of this date, showing that the sum of $42,514.03 is found due the claimants.

"As there is no appropriation available for the payment of the claim, the sum found due as shown by the Comptroller's letter is respectfully submitted for the action of Congress. Respectfully yours,

"A. B. NETTLETON,
"*Acting Secretary.*

"The SPEAKER OF THE HOUSE OF REPRESENTATIVES."

"TREASURY DEPARTMENT,
"FIRST COMPTROLLER'S OFFICE,
"*Washington, February 14, 1891.*

"SIR: The letter of Senator Blackburn, in regard to the claim of the sinking fund commissioners of the City of Louisville, Ky., is respectfully returned with the remark that the act for the relief of the claimant was passed by the Fifty-first Congress at the first session, on the 16th of June, 1890. It directed the Secretary of the Treasury and the Commissioner of Internal Revenue to audit and adjust the claim, which they have done, finding the amount of $42,514.03 due the claimant, the correctness of which finding is not questioned by this office. In due course, on the 4th instant, this claim, so adjusted, reached this office for payment. The act requiring the audit and adjustment does not carry an appropriation for the payment of the amount to the claimant, nor can it be paid out of the permanent annual appropriation, under section 3689, Revised Statutes.

"As the present Congress has had this matter under consideration, and referred it for adjustment, I see no impropriety in reporting it at once for an appropriation.

"Very respectfully,

"A. C. MATTHEWS,
Comptroller.

"Hon. A. B. NETTLETON,
"Acting Secretary of the Treasury."

The foregoing communications from the Secretary and Comptroller of the Treasury were referred to the Committee on Appropriations of the House of Representatives,

and considered by that committee, and afterwards the money was duly appropriated (26 U. S., p. 867). The following is the portion of the appropriation act that relates to this subject:

"PAYMENT TO CITY OF LOUISVILLE, KENTUCKY.

"For payment to the City of Louisville, Kentucky, the amount found due under the act of Congress approved June 16, 1890, and reported to Congress in House Executive Document No. 260 of the present session, $42,514.03."

In pursurance of said act the money was paid to the city by the proper officers of the Treasury Department.

The act of 1890 did not provide for the refund of taxes paid on interest on bonds, and on the 25th day of February, 1893, Congress passed the following additional special act:

"An act for the benefit of the State of Kentucky, Logan and Simpson Counties and of Louisville, Kentucky, and of Sumner and Davidson Counties, Tennessee.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, be, and he is hereby, authorized and required to audit and adjust the claims of the sinking fund commissioners of the State of Kentucky, of Logan and Simpson Counties in said State, of the City of Louisville, Kentucky, and of Sumner and Davidson Counties, Tennessee, for internal revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said counties, and city, respectively, in the Louisville and Nashville Railroad Company and of said State for internal revenue taxes collected and interest on railroad bonds of the railroad from Louisville to Lexington and on dividends on stock of said railroads owned by said State, and due and payable to said boards of sinking fund commissioners, respectively, and to said State, counties, and city, to the extent that such taxes

were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded, and for this purpose, any statute of limitation to the contrary notwithstanding, sections nine hundred and eighty-nine, thirty-two hundred and twenty, thirty-two hundred and twenty-six, thirty-two hundred and twenty-seven, and thirty-two hundred and twenty-eight of the United States Revised Statutes are hereby made applicable and available with the force and effect as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts when ascertained, as aforesaid, and not heretofore refunded, shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year.

"Approved, February 25, 1893."

Under this act the Fund Commissioners of Louisville made application for the refunding of the sum of $31,659.80 on account of taxes paid upon interest on bonds, and for the sum of $3,008.00 on account of taxes paid on stock dividends, making a total of $34,667.80. The claim of $3,008.00 for refund on account of taxes paid on stock dividends was not included or considered in the adjustment made under the act of 1890, but arose out of a stock dividend declared subsequently to the one which had been at that time considered and allowed.

The Commissioner of Internal Revenue proceeded to audit and adjust the aforesaid claim of $34,667.80, and upon such examination he found that taxes to the amount of $31,659.40 had been assessed, collected and deducted from and on account of interest on bonds belonging to the City of Louisville. Finding that there had been an error in computation in the amount allowed under the act of 1890, he corrected these errors, and having made such correction the Commissioner found that there was still due and unpaid to the City of Louisville, on account of taxes paid on interest upon bonds, the sum of $31,359.02

and that said sum had never theretofore been refunded; and a letter was addressed by the Hon. Geo. W. Wilson, Acting Commissioner of Internal Revenue, to the Secretary of the Treasury recommending the allowance of said sum, and asking the approval of the Secretary. The finding and recommendation of the Commissioner were approved by the Secretary of the Treasury on the 6th day of October, 1893, and on the 7th day of October, 1893, the aforesaid sum of $31,359.02 was formally scheduled and allowed by the Acting Commissioner of Internal Revenue, and the proper notices given to the officers of the Treasury Department (a copy of the letters of the Commissioner and Secretary and schedule are made exhibits to the petition in the case). The papers and schedule then went to the Fifth Auditor, and were passed by him. From thence they were certified to Hon. Robert Bowler, Comptroller of the Treasury, and he refused to issue or direct the issuance of a warrant or draft for the amount. He admitted the correctness of the amount found due by the Commissioner of Internal Revenue, to wit: the sum of $31,359.02, on account of taxes paid upon interest on bonds; but he claimed that the amount allowed by the Commissioner of Internal Revenue and Secretary of the Treasury in 1890, and which was paid under the appropriation act of 1891, on account of tax on undistributed surplus or stock dividends, was illegally refunded; and that it was his right and duty to deduct said sum so allowed and paid from the present sum of $31,359.02. He, therefore, deducted the sum of $17,633.43 from the aforesaid sum of $31,359.02, and directed the issuance of a draft for the balance, to wit: $13,725.59, and refused to direct or consent to the payment of any other or further sum. This action of the Comptroller was not taken on the ground of any error in computation or of newly-discovered evidence, but solely upon the

alleged ground that the action of the Commissioner and Secretary of the Treasury, under the act of 1890, in refunding taxes paid on account of undistributed surplus or stock dividends, was erroneous and unauthorized.

This suit is, therefore, brought to recover the sum of $17,633.43, being the balance of the $31,359.02 allowed by the Commissioner and Secretary, and which the Comptroller of the Treasury refused to pay.

The Court of Claims rendered judgment in favor of the Fund Commissioners of the City of Louisville, for the sum of $17,634.43 from which the United States takes an appeal.

II.

ARGUMENT.

The Action of the Comptroller of the Treasury in overruling and setting aside the findings and decision of the officers of the Treasury Department made in 1890 and 1891, and deducting the sum of $17,633.43, which had been allowed and paid by them, from the sum of $31,359.02, allowed in 1893 on account of interest on bonds, was illegal and unauthorized.

It was and is conceded that $31,359.02 had been collected by the Government as taxes upon interest on bonds belonging to the City of Louisville and that the collection of this tax was illegal. The tax was collected without warrant of law, and no part of it had ever been refunded.

By the act of February 25th, 1893, the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury was required to audit and adjust, among other things, the claim of the City of Louisville for in-

ternal revenue taxes collected on interest on railroad bonds owned by said city. The Commissioner found that taxes to the amount of $31,359.02 had been so collected and had never been refunded. This is an admitted fact.

The Comptroller, while not questioning the correctness or propriety of the allowance, refused to pay it, for the reason that two years before that time the officers of the Treasury Department had allowed and paid a certain sum of money which in Mr. Bowler's judgment ought not to have been done. There had been refunded to the city of Louisville the sum of $17,633.43 on account of taxes collected upon undistributed surplus which had been converted into stock dividends. It was not denied that taxes had been collected upon such dividends and that the city had been a loser to that extent. Neither was it contended that the tax collected in 1891 had any relation to the claim for refunding taxes paid upon interest on bonds in 1893. The two claims were different and distinct. But in the opinion of the Comptroller, the officers of the Treasury Department had committed error, and it was his duty to correct it. Having come to the conclusion that the former Commissioner and Secretary misunderstood the law he took the responsibility of reversing their action and deducting the amount allowed by them from the $31,359.02.

In relation to this claim of $17,633.43 action had been taken as follows:

January 24th, 1891, it was considered and its payment recommended by John W. Mason, Commissioner of Internal Revenue.

January 27th its payment was approved by William Windom, Secretary of the Treasury.

January 28th it was formally scheduled and allowed by John W. Mason, Commissioner of Internal Revenue.

February 3d it was reviewed and passed by the fifth Auditor.

February 14th the Secretary and Comptroller recommended to Congress that an appropriation be made to pay the claim.

March 3d, 1891, the money for its payment was appropriated by Congress.

March 7th, 1891, the sum of $17,633.43 (being part of the $42,514.03) was paid by order of A. C. Matthews, Comptroller of the Treasurer.

All these things were done more than two years before Mr. Bowler came into office.

By what right or authority can he reach back over this period of time and set aside all that was done by his predecessors?

In order to do it, he had to reverse the action of Mason, the Commissioner, Windom, the Secretary, and Matthews, the Comptroller. In addition to this he had also to repeal or nullify an act of Congress appropriating the money for the payment of the claim.

It is not often in the history of the country that we find such an extraordinary union of executive, judicial and legislative authority in a single person.

1. We contend, first, that the action of the former Commissioner, Secretary of the Treasury, Comptroller, and Congress, whether right or wrong, could not be reviewed by Mr. Bowler. The claim of $17,633.43, allowed and paid in 1891, was settled and must stay settled and adjusted forever.

No doctrine is better established than that the head of a department or bureau can not set aside, reverse or modify the decision of his predecessor in office, except for error in computation, newly-discovered and material evidence, or fraud. It will not be contended that any

of these things exist in this case. There were clerical errors or errors in computation which were corrected by the Commissioner of Internal Revenue as soon as discovered. There was no other error. That allowance of $17,633.43 was not the result of mistake but was made after careful consideration by the Commissioner and the Secretary of the Treasury. The then Solicitor of the Internal Revenue, to whom the subject was referred, gave an opinion, which is on file among the papers in this case, in which he expressly asserts that the tax collected on stock dividends should be refunded the same as the tax upon cash dividends. The following is an extract from his opinion:

"In one case it is cash, in the other stock. The burden of tax is the same in both instances. In each case the amount of payment to the city is diminished 5 per cent. on account of the tax. If it was unjust to collect the tax on the cash dividend because it was owned and held by a municipal corporation, it was equally unjust to collect a tax on a stock dividend for the same reason. And if the city is entitled to recover back the tax taken in one case, it is equally entitled to recover it back in the other. It is a sum of money obtained by the government without warrant or law. It is improperly in the Treasury, and the government having obtained possession of money which does not belong to it, it should pay it back to the rightful owner."

The foregoing quotation is made to show that the allowance on stock dividends was not a matter of accident or mistake, but was the deliberate judgment of the Commissioner and Secretary.

There is no pretense of any newly-discovered evidence. The facts were the same then as now and as well understood.

As to fraud—it will hardly be contended that Commissioner Mason, Secretary Windom, the Senate and

House of Representatives, Comptroller Matthews, and the Treasurer of the United States, entered into a conspiracy to rob the Treasury.

The only ground upon which the Comptroller of the Treasury claimed that the tax allowed in 1891 on stock certificates should be taken out of the $31,359.02, is that the action of the officers of the Treasury Department and Congress was erroneous; that they were guilty of an error of judgment; and that it was his right and duty to correct their errors.

But, as before intimated, if he was right and they were all wrong upon the legal question, it was beyond his jurisdiction and he could not touch or reverse their action, because of the well-established and long-observed practice of the departments and the adjudications of the courts. There should be an end to all controversies. If Mr. Bowler might be permitted to reverse the official action of the former officers of the Treasury Department, then his successors may reverse him and so on to the end of time. Questions would never be settled. Nothing would ever be put at rest. Claims would be bandied back and forth, changing as often as the administrations changed or as often as the judgments of public officers differed. We are none of us so absolutely immaculate that we can arrogate to ourselves superiority over everybody else, and we should be diffident about attempting to exercise ministerial, judicial and legislative power at the same time.

The proposition we have stated is not only founded in reason, but it is supported by the long practice of the government, and by a long line of judicial authorities. It seems superfluous to enter into any detailed examination of authorities, but we take the liberty of referring to a few cases.

In United States *v.* Bank of Metropolis (15 Peters, 114), the court says:

"The right in an incumbent of reviewing a predecessor's decisions extends to mistakes in matters of fact arising from errors in calculation, and to cases of rejected claims in which material testimony is afterward discovered and produced."

This doctrine has been followed ever since and expressed in a variety of forms and with great emphasis. The question has been before the Court of Claims in a number of instances. The last case is that of Armstrong and 158 others, decided in March, 1894. The opinion of the court contains a careful and able review of the authorities upon the subject. It adopts as sound law the decision in the Waddell case (25 Court of Claims, 323, 327), wherein it is declared that—

"The law has been too well settled to be in doubt at this time; that public officers can not open and re-examine cases decided by their predecessors, except for fraud, mistakes in matters of fact arising from errors in calculation, or newly-discovered material evidence."

The same idea is expressed in another form in the Jackson case (19 Court of Claims, 504), in which the following language is used:

"It is a settled rule of administrative law that the final decision of a matter before the head of an executive department is binding upon his successor if no material testimony be afterward discovered and produced."

The opinions of the Attorneys-General are uniformly in the same direction. Some of these opinions are referred to in the Armstrong case, and set forth most clearly and with great strength that the doctrine of *res adjudicata* applies to claims considered by the head of a department, and that a decision made, whether right or wrong, can not be overruled by his successor.

In the light of these authorities what possible ground

can be found to sustain the view of the Comptroller as to his right to reverse the former action of the Treasury Department. It was not a matter of mistake, fraud or error in calculation; but a simple matter of legal judgment and learning.

2. The act of 1893 did not authorize re-adjudication of claim of 1890.

It is contended by counsel for the appellant that the act of 1893 authorized the Comptroller to open up and re-examine the claims which were presented to and allowed by Commissioner Mason in 1891.

No such authority can be found in the act. Certainly it is not given in express terms. Nor can we discover anything from which it can be inferred. Is it possible that Congress intended to confer upon Commissioner Miller or the Comptroller the right to re-examine and allow or disallow claims that had been adjusted, allowed and *paid* two years before? If so, it was easy to say it in express terms. Some reliance seems to be placed by counsel upon that clause in the act which declares that "taxes are to be refunded to the extent that such taxes were deducted from any dividends or interest due and payable to such boards and *which have not been heretofore refunded.*

This is one of the excuses offered for a re-examination of the seventeen thousand dollar claim. The clause referred to can not change the question or alter the situation in any respect. The fact that the sum of $17,633.43 was adjudicated, allowed and paid by the Treasury Department in 1891 still remains; the fact that it is now a mere difference of opinion still remains; and the fact that the Comptroller was attempting to reverse the action of his predecessors also remains. That clause of the act was never intended to confer power to revise or reverse former judgments, and the language used will not admit of

such construction. The questions submitted by the special act to the Commissioner and the Secretary were, first, were taxes deducted from dividends or interest; and, second, have these taxes so deducted ever been refunded? The officers found that $31,359.02 had been deducted from *interest on bonds*, and that said taxes had never been refunded. The correctness of this finding is not disputed. There is no pretense that a dollar of taxes paid on account of interest on bonds had ever been refunded. The special act of Congress under which former allowances were made did not cover taxes paid on account of interest at all.

3. Commissioner Miller did not attempt to reverse the action of his predecessor.

If it is contended by counsel for the appellant that Commissioner Miller did as a matter of fact review the proceedings of Commissioner Mason, and that this fact in some manner justifies the Comptroller in what he did, our answer is, that no such argument can be fairly drawn from the transaction. The act of 1893, as already stated, directed the Commissioner to ascertain whether any taxes on bonds or stocks had been illegally collected. This was his first duty. If he found that no taxes had been illegally collected, that ended the business; but if he found that such taxes had been collected, then his second step was to find out whether they had ever been refunded. One of the ways to ascertain this fact was to examine the cases where a refund had been made at a former period. This led him to examine the transaction of 1891. Not for the purpose of re-adjudicating or reversing what had been done, but simply to ascertain whether the present claim was included in the former allowance. In making that examination he discovered certain errors in calculation, which he corrected. This ended his work, and there was

no further duty for him to perform. The purpose of the clause in the act of 1893, which requires the Commissioner to find out whether certain taxes had been refunded, was to prevent double payment.

Again, it is proper to observe, that the act of 1893 did not confer any power whatever upon the Comptroller. He is not named in the act and he was not the person to whom these matters were submitted. Even if we admit that the commissioner had the right under the act of 1893 to review and reverse the judgment of his predecessor, that would confer no authority upon the Comptroller to do so. The facts show that Commissioner Miller made no attempt to reverse or modify Mason's decision. He simply corrected errors in computation. There was no attempt to set aside the refund of taxes which had been made on account of stock dividends, nor to reverse or modify it in any form.

It is a part of the history of the case that the Comptroller requested Commissioner Miller to review his action and take out the $17,633 which had been allowed in stock dividends and that he refused to do it. In his letter declining the request the Commissioner says:

"The question raised by the Comptroller has received very careful consideration, and I feel satisfied, first, that the deduction of the amount heretofore refunded to the City of Louisville on account of 'stock dividends' from the sum now found due as tax improperly collected on interest on bonds, ought not to be made.

"For such action, whether the former allowance was proper or not, would be equivalent to reopening that claim and reversing the action of my predecessor. This would plainly be contrary to the law as construed by the courts and Attorneys-General.

"I feel satisfied, in the second place, that Congress intended in the act of February 25, 1893, to authorize the refunding of the tax on 'stock dividends.'

"The previous allowance to the City of Louisville, under the provisions of the special act of June 16, 1890, which allowance embraced a sum computed as tax on a stock dividend, was ratified by Congress in the act of March 3, 1891, making an appropriation for payment of such allowance."

4. There was no effort by City of Louisville to reverse or modify decision of 1891.

It is urged as a reason why the Comptroller was warranted in reviewing and reversing the act of Commissioner Mason, that the City of Louisville in its claim made under the act of 1893, presented a claim that had been rejected under the act of 1890. This refers to the item of $3,008.40.

The counsel, on page 27 of their brief, say:

"Had the appellees not seen fit to make the claim for these items, then (supposing for the sake of argument that no part of the payment of 1891 could be recovered back without a re-opening by authority of Congress) the settlement of 1891 could not have been re-opened; for the mere re-examination of the items of that settlement required by the act of 1893, in order to prevent an allowance of taxes already refunded, could not strictly be called a re-opening, and there was nothing in the act to authorize the Commissioner of Internal Revenue to reopen the settlement of his own motion without request from the appellees. The appellees, however, by presenting again these previously disallowed items, demanded a re-consideration of the previous decision and a setting aside of the old settlement which had excluded these items."

The point made by counsel vanishes into air the moment you consider the facts.

The item of $3,008.40 arose out of a 100 per cent. stock dividend made in 1880. It had nothing whatever to do with the $17,000 allowance made in 1891.

That was based solely on the stock dividend of 40 per cent. which was declared in 1867–68. It is doubtful whether the $3,008.40 item was even presented in 1890, and whether it was or not it was not considered by Commissioner Mason at all. His allowance was confined to the 1867 dividend. The court in its fourth finding of fact uses the following language:

"Evidence was presented of the 40 per cent. increase in the stock of the railroad company in 1867–68 mentioned in the second finding, but it does not appear that any evidence as to the 100 per cent. increase of stock in 1880 was presented at that time."

There was therefore no consideration of it, and its after consideration in 1893 was not intended in any degree to affect the allowances made in 1891.

The above quoted paragraph from the brief of counsel makes certain important admissions which deserve notice. They are, first, that Commissioner Miller could not, under the act of 1893, on his own motion, open up the proceedings of his predecessor. Second, that unless the claimant asked to have the same opened up and reconsidered the settlement of 1891 must stand and

Third, that the review of former proceedings, merely for the purpose of preventing the allowance of taxes already refunded, would not justify a reversal or setting aside of the finding of 1891.

In view of the facts, these admissions are fatal to the contention made by counsel for the appellant.

5. *Consideration of authorities cited by counsel for the government.*

The counsel for appellants have shown great diligence and ability in the collection and arrangement of authorities. One of these, the County of Logan *v.* the United

States (31 C. Clms R., 23) is referred to in several parts of their brief, and is relied upon to support their contention. As that is one of the causes now under argument, it can hardly be regarded as undisputed law. On the contrary, we utterly deny its authority, and submit that it is the duty of this court to reverse the judgment rendered in that case.

As to the other authorities referred to, we are not inclined to dispute the principles enunciated and the weight to be given them in a proper case. They do not, however, support the position taken by appellants' counsel. They do not change the decision in U. S. *v.* Bank of Metropolis, which declares that "if a credit has been given or an allowance made by the head of a department, and it is alleged to be illegal, the judicial tribunals must be resorted to to construe the law under which the allowance was made and settle the rights between the United States and the party to whom the credit is given."

All that can be claimed for the cases cited, is that they announce in substance that the government is not in all cases bound by the illegal or improper action of executive officers, and that in a suit properly instituted in the proper court, the action of such officers may be reviewed.

No such condition of affairs exists and no such case is here presented. The inference which counsel draws from the authorities seems to be that the Comptroller may review, reverse or modify the finding and decision of any executive officer of the government and even the action of Congress itself, whenever in his opinion there has been a mistake of law or fact, or whenever the action taken has been unwise or done in ignorance. Such a doctrine is not only unsupported by judicial decisions, but if carried out would overthrow long-established precedents and result in endless confusion and disaster. The government is most successful when each branch is kept

separate and each officer confines himself to the duties which belong to his position. It is undoubtedly true that certain Comptrollers of the Treasury have deemed themselves clothed with extraordinary functions and have seemed to think that they, by virtue of their office, were made superior to all other executive officers, and even to the courts and Congress. We deny that they ever rightfully possessed any such power.

The Comptroller is not a judicial officer. He is an executive, or accounting officer. It was no part of his duty to adjudicate or pass upon the validity of the Louisville or Logan County claim. The statute imposed that business upon another and different tribunal, and when the Comptroller arbitrarily refuses to pay an allowance found by the only persons authorized to make it, he is usurping powers which belong to others and is acting in disregard of the law and in violation of his duties as a public officer.

III.

The act of Congress appropriating the money to pay the allowance on stock dividends is a legislative sanction of what was done by the Commissioner and Secretary.

These officers had performed the duty assigned them by the statute of 1890. They found that taxes had been paid on cash dividends to the amount of $24,801.14, and on account of stock dividends to the amount of $17,712.80, making a total of $42,514.93. There was no money in the treasury out of which it could be paid. They therefore submitted the whole matter to Congress and Congress directed the payment of the entire sum. This was a formal approval of the action taken by the Commissioner and Secretary.

The authority referred to in the decision of the Court of Claims in its opinion in this case is directly in point.

In case of Jordan *v.* United States (19 Court of Claims, 108), which involved a similar question, the court, among other things, says:

"But whatever induced Congress to take the several cases of numerous persons named in the act and to grant them relief from the public treasury the specific sum of money therein mentioned, whether it was for reasons set out in the act itself or for other and different reasons, their action is final and conclusive and can not be reviewed by this court or by any executive officer. It would be an unwarranted assumption of power to review elsewhere the facts and reasons which Congress states for granting money in any of the numerous cases—special acts passed for the relief of individual persons—and to deprive such persons of the money appropriated for them merely because it is held here in the Treasury Department that the conclusions of the act are not warranted by the facts and reasons upon which they purport to be founded."

The Supreme Court of the United States (113 U. S., 418–442) affirmed the judgment of the Court of Claims and declared, among other things, that—

"No discretion is vested in the Secretary of the Treasury or in any court to determine whether the sum specified was or was not the amount of tax assessed contrary to the provisions of such regulations."

The act of appropriating the money to pay the allowance made to the City of Louisville, by Commissioner Mason and Secretary Windom, is as explicit as words can possibly make it. It reads—

"For payment to the City of Louisville Kentucky, the *amount found due*, under the act of Congress approved June sixteenth, eighteen hundred and ninety, and re-

ported to Congress in House Executive document numbered *two hundred and sixty* of the present session, forty two thousand five hundred and fourteen dollars and three cents."

Counsel for appellant seek to avoid the force and effect of this appropriation act by a variety of statements. They are compelled to admit that the amount found due by Commissioner Mason and Secretary Windom was $42,514.03 and also that that was the sum reported in executive document No. 260. But they claim that only $24,801.14 was "*really* found due"; that the statement that $42,514.03 was found due "was, legally speaking, false"; that Congress was "misled"; that Congress "acted ignorantly"; and in short, that the legislative branch of the government did not understand its business.

We submit that Congress is presumed to act intelligently, and that it is hardly becoming in us to contend that Congress is ignorant and incompetent. If every law might be impeached because some outside party questioned its wisdom or because such party knows more than the body enacting the law, it would be difficult to tell what statutes are in force and what ones are not. It is a safe rule to obey the law. In the present case, however, there is affirmative evidence that Congress understood perfectly the basis upon which the appropriation was made. The same Congress passed the act of 1890, and the whole subject had been carefully considered by Committees of the two Houses.

IV.

The claim of $17,633.43 can not be a set-off.

The allowance of the $31,359.02 on account of interest on bonds is conceded to be just and legal. Even if the Comptroller had the right to review the proceedings of

Commissioner Mason and offset any sum which had been improperly allowed against the thirty-one thousand three hundred and fifty-nine dollars, the claim so used as a set-off must be a *valid* claim against the City of Louisville and in favor of the United States,—one which could be enforced by an action at law. The seventeen thousand dollars was a claim for taxes on *incomes*. The income tax was unconstitutional and being so the government having refunded it, could not recover it back.

We therefore submit:

That the action of the Commissioner of Internal Revenue and the Secretary of the Treasury in 1891 in allowing the sum of $17,633.43 to the city of Louisville on account of stock dividends could not be impeached or set aside by the Comptroller of the Treasury in 1893;

That the act of Congress appropriating the money to pay the claim was a legislative recognition of its validity; and

That even if the Comptroller had the right to review the action of his predecessor and nullify the law of Congress making the appropriation, still the seventeen thousand dollar claim could not be set off against the $31,359 for the reason that it was not a valid claim against the City of Louisville in favor of the government.

The judgment of the Court of Claims should be affirmed.

V.

We respectfully present the following additional propositions:

First. The judgment and finding of the Commissioner and Secretary made under the act of 1890, constitute an award which can not be impeached or reversed by the Comptroller or the court except upon the ground of mistake or fraud. Their action is equivalent to the rendition

of a judgment in favor of the claimants against the government, or it is at least the statement of an account by the proper authorities and is binding upon the United States. Now, after this finding has been made and the decision rendered, the Comptroller can not set it aside.

It is as if the judge of a court had rendered judgment in favor of a plaintiff, and the sheriff or marshal holding the writ of execution should attempt to overrule the court and change the journal entry or the writ.

It is wholly beyond his jurisdiction. He is merely a part of the machinery by which, when the amount is ascertained, the money is to be paid. He has nothing to do with it, or any control over the question of liability. The Commissioner of Internal Revenue and the Secretary of the Treasury are the tribunal to which the law commits the determination of the case. The Comptroller has no right to overrule his superiors or override their decision. Neither has he any right to seek to defeat and neutralize their findings by going back and undoing, or attempting to undo, the work of a former administration.

If Congress had intended to constitute him a member of the tribunal, which was to decide the questions submitted in the special act, it would have added his name to the list; and if it had intended he should review the action of the Commissioner and Secretary it would have said so, in plain language.

United States *v.* Kaufman, 96 U. S. R., 567;
United States *v.* Savings Bank, 104 U. S. R., 728.

Second. Even if we assume that the Comptroller had the right to review the judgment of his predecessor, the finding and decision of Commissioner Mason and Secretary Windom in 1891 must stand, for the reason that they were warranted by the facts and the law.

Third. The history of the passage of the acts of 1890

and 1893 expressly shows that Congress intended to refund the taxes paid on undistributed surplus or stock dividends.

Fourth. The act under which the taxes in controversy were collected by the government was unconstitutional and the party injured is entitled to relief.

The last four propositions apply not only to the case we have been considering, but also to the case of the Fund Commissioners of Logan County *v.* The United States, and we beg leave to refer for a continuation of the argument to our brief in the last named case.

ALPHONSO HART,
Attorney for Appellees.

FONTAINE T. FOX,
of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 167.

THE COMMISSIONERS OF THE SINKING FUND OF LOGAN COUNTY AND THE COUNTY OF LOGAN, KENTUCKY, *Appellants,*

v.

THE UNITED STATES.

Brief of Alphonso Hart in behalf of Appellants.

STATEMENT OF THE CASE.

The County of Logan, in the State of Kentucky, was, between the first day of October, 1862, and the sixth day of July, 1872, the owner of a large amount of the stock of the Louisville and Nashville Railroad Company. Cash dividends were declared upon this stock. There was also a large amount of undistributed surplus belonging to the county, upon which stock or scrip dividends were issued to the county. These cash dividends and the undistributed surplus which was converted into stock or scrip dividends were held by the officers of the government to be subject to taxation, and taxes were assessed and collected according to the terms of the statute in force at

the time of the respective collections. The taxes were paid by the railroad company, and the amounts so paid were deducted by the company from the sums due and payable to the County of Logan—that is to say, before paying over dividends, the taxes were taken out, and the county received the dividends diminished by the amount of the taxes so paid, and its revenues were lessened to that extent. In the month of May, 1893, the Fund Commissioner of said County of Logan made application to the Commissioner of Internal Revenue under the act of Congress passed February 25, 1893, entitled, "An Act for the Benefit of the State of Kentucky, Logan and Simpson Counties and of Louisville, Kentucky, and of Sumner and Davidson Counties, Tennessee" (Chapter 165, U. S. Statutes of 1893), for the refunding of the sum of $17,606.14.

The act referred to reads as follows:

"An act for the benefit of the State of Kentucky, Logan and Simpson counties, and of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, be, and he is hereby, authorized and required to audit and adjust the claims of the sinking fund commissioners of the State of Kentucky, of Logan and Simpson counties in said State, of the city of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee, for internal revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said counties, and city, respectively, in the Louisville and Nashville Railroad Company and of said State for internal revenue taxes collected and interest on railroad bonds of the railroad from Louisville to Lexington and on dividends on stock of said railroads owned by said State, and due and payable to said boards of sinking fund commissioners,

respectively, and to said State, counties, and city, to the extent that such taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded, and for this purpose, any statute of limitation to the contrary notwithstanding, sections nine hundred and eighty-nine, thirty-two hundred and twenty, thirty-two hundred and twenty-six, thirty-two hundred and twenty-seven, and thirty-two hundred and twenty-eight of the United States Revised Statutes are hereby made applicable and available with the force and effect as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts when ascertained, as aforesaid, and not heretofore refunded, shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year.

"Approved, February 25, 1893."

Directed by the aforesaid act of Congress, the Commissioner of Internal Revenue proceeded to examine, audit and adjust said claim, and found that the sum of $9,533.54 of taxes had been deducted from the cash dividends and $5,864.21 of taxes had been deducted from the undistributed surplus or stock dividends, due and belonging to said county, and that there was due to said county on account of taxes so collected and paid, the sum of $15,397.75, and that no part of said taxes had ever been refunded. And Hon. Geo. W. Wilson, Acting Commissioner of Internal Revenue, on the 28th day of September, 1893, addressed a letter to the Secretary of the Treasury recommending the allowance of said sum, and asking his approval. On the 6th day of October, 1893, Hon. C. S. Hamlin, Acting Secretary of the Treasury, approved this action and recommendation of the Commissioner, and on the seventh day of October, 1893, it was formally scheduled and allowed by the Hon. Geo. W. Wilson, Acting Commissioner of Internal Revenue, of which notice was given to the proper officers of the Treas-

ury Department. The schedule so made out and the papers in the case were referred to the Fifth Auditor of the Treasury and passed and approved by him. They then went before the First Comptroller, and he refused to issue a warrant for the amount or direct the payment of the same, holding that the allowance of the claim for taxes paid on account of stock dividends was illegal and unauthorized. He, thereupon, directed the payment of $9,533.54 and refused to pay any other or further sum. This suit is brought to recover the sum of $5,864.21, which was rejected by the Comptroller and which he refused to pay.

The draft issued by the Treasury Department for the sum allowed by the Comptroller was accepted by the County of Logan in part payment only of its claims, it expressly reserving the right to sue for the balance.

The letters of the Commissioner and Secretary by which said claims were allowed and approved are annexed to the petition and set forth in the record.

Suit was brought in the Court of Claims to recover said sum of $5,864.21, and the petition was dismissed. This is an appeal from that decision.

None of the taxes which were asked to be refunded were paid by the county itself, but by the railroad company, without the knowledge of the officers of the county. The railroad acted as the agent of the county and paid the taxes by authority of section 122 of the act of June 30th, 1864, which provides that said companies "are authorized to deduct and withhold from all payments on account of any interest or coupon and dividends due and payable as aforesaid the duty of five per centum, and the payment of the amount of said duty so deducted from the interest, coupons or dividends * * * shall discharge said company from that amount of the dividend or interest or coupon * * * ."

Prior to the passage of the act of 1893, under which the Commissioner and Secretary acted, the City of Louisville, Kentucky, had been allowed a refunding of taxes, under an act of a similar character which was passed in 1890, the sum of $24,801.14, on account of cash dividends, and of $17,712.80 on account of stock dividends or undistributed surplus, making a total of $42,514.03, and Congress appropriated the money to pay the same. The act making the appropriation reads as follows:

"For payment to the city of Louisville, Kentucky, the amount *found due* under the act of Congress approved June 16, 1890, and reported to Congress in House Executive Document No. 260 of the present session, $42,514.03.

And the money was paid to the city by the proper officers of the Treasury Department.

The two amounts which were found due and which made up the above sum of $42,514.03 were found due in precisely the same manner as were the amounts found due in the Logan county case and under a statute having substantially the same phraseology.

ASSIGNMENT OF ERRORS.

1. The Court of Claims erred in finding and holding that the award made by the Commissioner of Internal Revenue and the Secretary of the Treasury was not final and binding upon the Government.
2. In finding and holding that the judgment and decision of the Commissioner and Secretary could be overruled by the Comptroller or attacked in this action.
3. The judgment of the Court of Claims is not sustained or warranted by the facts as found by said court.
4. By the act of Congress approved February 25, 1893,

the said Commissioner and Secretary were authorized and required to audit and adjust the claim of petitioners for a refunding of taxes and ascertain the amount of the taxes so to be refunded, which were to be paid out of the permanent annual appropriation provided for similar claims, and their finding can not be questioned in this action, except upon the ground of mistake or fraud.

5. The Court of Claims erred in holding that the Commissioner and Secretary had no jurisdiction over the matter of refunding taxes on account of stock dividends.
6. The judgment and finding of the Commissioner and Secretary were in accordance with the facts and law.
7. Instead of a judgment dismissing the petition there should have been a judgment in favor of petitioners.

ARGUMENT.

I.

The finding made by the Commissioner of Internal Revenue and the Secretary of the Treasury was an award having all the force of a judgment and could not be questioned either by the Comptroller or the Courts, except for fraud or mistake.

On the 25th day of February, 1893, Congress passed an act authorizing and requiring the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to audit and adjust, among other things, the claim of the sinking fund commissioners of Logan County for the refunding of internal revenue taxes paid

on railroad dividends in stock and interest on bonds owned by said county to the extent that such taxes were deducted from any dividends or interest due and payable and which have not been heretofore refunded.

This constituted the Commissioner and Secretary a tribunal to decide the whole question, and in the absence of fraud, mistake or error in calculation, their adjudication was final. They were judges of the facts and law.

Acting under the authority of and discharging the duty imposed by the statute, the Commissioner and Secretary found there was due to the fund commissioners of Logan County, on account of taxes collected on cash dividends the sum of $9,533.54, and on account of undistributed surplus or stock dividends the sum of $5,864.21.

This is an award made by the special tribunal authorized by Congress. It has all the force and effect of a judgment.

The authorities are clear and convincing upon this subject.

In this connection we call attention to the following decisions.

The case of the United States *v.* Kaufman (96 U. S. R., 567) is directly in point.

In that case, Kaufman had paid fifty dollars more than the law required, and made application under the statute and regulations of the Treasury Department to have this sum refunded. The Commissioner of Internal Revenue granted the application and recommended the refunding of $47.50 and certified the fact to the Comptroller. The Comptroller refused to pay—upon what ground does not clearly appear. Kaufman brought suit in the Court of Claims to recover the amount. Judgment was rendered in his favor. The United States appealed to the Supreme Court and the Supreme Court affirmed the judgment of

the Court of Claims. Mr. Chief Justice Waite, in delivering the opinion of the court, says:

"It is now insisted that the finding of an allowance by the Commissioner is not enough, and that the court should have gone behind the allowance and found the facts in respect to the original claim. Such we think is not the law. To say the least, the allowance of a claim under this statute is equivalent to an account settled between private parties which is good until impeached for fraud or mistake. It is not the allowance of an ordinary claim against the Government by an ordinary accounting officer, but the adjudication by the first tribunal to which the matter must by law be submitted. Until so submitted, and until so adjudicated, there is not a *prima facie* liability of the Government, but, when submitted and when allowed upon the adjudication, the liability is complete until in some appropriate form it is impeached."

Further speaking of the matter, the learned Chief Justice says:

"The foundation of the suit is the refusal of the Government to pay a claim allowed by an officer authorized to pay moneys overpaid under certain circumstances, but who can only make payment through the proper disbursing agents of the Treasury. The officer has done all he can do. He has made the allowance and certified it to the Comptroller of the Treasury for payments."

See Bonton's case, 12 Court of Claims, 336.

The case of U. S. *v.* Savings Bank (104 U. S. R., 728), reaffirms the doctrine.

This was a case similar to the one above quoted.

Mr. Chief Justice Waite reviews and affirms the opinion in the Kaufman case, and says:

"We can not discover any material difference between the powers of the Commissioner under section 3426 and these which he has under section 3220. Under section 3426, he is to 'allow' the claim which is done either by

giving other stamps in lieu of these that have been spoiled, &c., or by repaying the amount or value. Under section 3220, he is to 'refund' and 'pay back.' His payment of money in both cases must be made through the accounting officers of the Treasury Department as he himself is not a disbursing officer. Whether his allowance is conclusive on the other officers, through whose hands it must necessarily pass before it can be paid by the Treasurer, we did not then and need not now decide. All we said then and all we say now is, that if payment is not made by reason of the refusal of any of the officers of the Department to pass or pay the claim after it is once allowed by the Commissioner the allowance may be used as the basis of an action against the United States in the Court of Claims where it will be *prima facie* evidence of the amount that is due, and put on the Government the burden of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the Department declined to do what the law or Treasury regulations required of him before payment could be obtained. The fact of fraud, or mistake, must be established by competent evidence the same as any other fact in issue. An allowance by the Commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress."

In the foregoing cases the Commissioner acted under the powers conferred by a general statute giving authority to refund taxes improperly collected, or redeem stamps that have been lost or destroyed. If the act of the Commissioner under this general statute is final and can not be reviewed except for fraud or mistake, how much more is it so, when by a special act of Congress he is clothed with the authority and duty of investigating and rendering judgment. In the latter case he acts in direct and special obedience to a mandate issued by Congress.

Applying the decisions above quoted to the case now under consideration, there can be no doubt as to the finality of the adjudication by the Commissioner and Secretary, and we need go no further. Their award of $5,864.21 should stand, and it was the duty of the Court of Claims to render judgment in favor of the claimant for that amount. Refusing to do so, it committed error.

II.

The finding of the Commissioner was in accordance with the law and facts. Appellants were entitled to a refund of the taxes paid on account of stock dividends.

Assuming, however, for the time being, that the judgment of the Commissioner was not final and that the Comptroller and the court had a right to inquire into the matter as an original question, we assert that the decision rendered by the Commissioner was fully sustained by the facts and law of the case. Indeed, it was impossible to come to any other conclusion. The purpose of the statutes was to compensate for the losses which the city and county had sustained by reason of the payment of an illegal tax, and we submit that both upon principle and authority the City of Louisville was entitled to have the sum of $17,633.43 and the County of Logan was entitled to have $5,864.21 refunded. When a wrong is done, the correction should be as broad as the wrong itself.

The city and county owned a large amount of the stock of the Louisville & Nashville Railroad Company. Out of and upon this stock grew a large surplus fund. A part of this surplus was converted into cash dividends and another part was converted into stock dividends. This entire surplus was assessed with a tax. The whole

of the tax collected was illegal. Upon what principle of ethics or law do you refund a part and not the whole? It makes no difference whether the tax was taken out before the dividend was paid, or after. If one hundred dollars is due me and you take out ten under the name of tax and give me but ninety dollars, I am as much the loser as if the whole hundred had been paid into my hands, and then ten dollars had been taken from me. In the present case, the tax was paid by the railroad company and the dividends less the tax were paid to the city and county.

The method of proceeding is described by the Commissioner of Internal Revenue in a letter to the Secretary of the Treasury October 15, 1889 (Hardin County claim), as follows:

"The records of this office show that the Louisville and Nashville Railroad Company paid the full internal revenue tax on all dividends declared and paid during the period of taxation now in question, namely, from June 1, 1864, to December 31, 1871. It appears from returns made to this office by the railroad company, that the dividends were declared so as to include a given per cent. of capital (three per cent. for example) *and the taxes due thereon.* By this method the stockholders received the full three per cent. on their shares of stock and the United States received the full tax thereon. Those stockholders whose dividends were not taxable should have received the sum paid the United States as a tax on their dividend."

The statute speaks of money and scrip dividends, and requires that a tax shall be paid upon both. In Bailey *v.* Railroad, 22 Wall., 604, scrip and stock dividends as well as cash dividends are held subject to tax under the Internal Revenue laws. They are all assessed and collected under the same rule and treated precisely in the same way.

1. The decision of the court is founded on a misapprehension of the facts.

The ground upon which the decision of the Court of Claims is based in the Logan County case seems to be that the taxes assessed and collected had no connection with the surplus which went into the stock dividend, but was upon the gross profits of the road which were used for general expenses.

Mr. Justice Nott in the course of his opinion (page 13) uses the following language:

"The question then is, Was the Commissioner of Internal Revenue authorized to make this refund of a tax on moneys which were profits, but which were *never distributed* or *paid over to the shareholders as dividends?*"

On page 14 is the following:

"What right then had the claimant under the act of 1864 to a refund of the 5 per cent. tax paid on profits which were not distributed as dividends, but retained by the company for its own corporate purposes?"

Again, on page 15, the learned judge uses the following language:

"It (the surplus) remained in the hands of the company and was applied to the business purposes—to improving, increasing and augmenting the corporate property. It might have been distributed as dividends, *but was not.*"

We respectfully submit that the court labored under a misapprehension of the facts as shown by the records.

No tax paid upon the gross profits or income was ever refunded either by Commissioner Mason or Commissioner Miller, but on the contrary, the claim for a refund of taxes on gross profits was expressly rejected. The tax which *was* refunded and which is now in controversy was

the tax paid upon the surplus which entered into the stock dividend. This surplus fund was expressly distributed in *the form of a stock* dividend, and it was the same in both the Louisville and Logan County cases.

The letter of Acting Commissioner Wilson to the Secretary of the Treasury in its closing paragraph (p. 4) says:

"The tax claim was collected on the dividends and the surplus afterwards converted into dividends on stocks of the Louisville and Nashville Railroad Company held by Logan County, Kentucky, between October 1, 1862, and July 5, 1872. The total amount withheld from said county on account of tax on dividend on stock is found to be nine thousand five hundred and thirty-three dollars and fifty-four cents ($9,533.54) and the total share of taxes on surplus borne by said county is found to be five thousand eight hundred and sixty-four dollars and twenty-one cents ($5,864.21), making an aggregate of fifteen thousand three hundred and ninety-seven dollars and seventy-five cents ($15,397.75).

"I propose to allow the claim for this amount."

The acting Secretary of the Treasury in his letter approving the Commissioner's recommendation (page 5), speaks of the claims as follows:

"You find that the sum of $15,397.75 was withheld by said Louisville and Nashville Railroad as follows: $9,533.54 on account of tax on dividends on stock of said railroad company held by Logan County, and $5,864.21 on account of tax on the surplus afterwards converted into dividends on stocks in said company held by said county.

"Your allowance is hereby approved, and the claim is herewith returned."

But we call special attention to the fifth finding of fact (page 9) made by the court in this case.

"Prior to the passage of the act 25th February, 1893, the following proceedings had taken place in the Treas-

ury Department relative to *the same taxes paid by the same company:*

"During the period from October 1, 1862, to July 6, 1872, the City of Louisville, Ky., was the owner of a large amount of the stock and bonds of the Louisville and Nashville Railroad Company. Cash dividends were declared upon this stock. *There was also a large amount of undistributed surplus belonging to the city, upon which stock or scrip dividends were issued to the city.* These cash dividends and the undistributed surplus which was converted into stock or scrip dividends were held by the officers of the government to be subject to taxation, and taxes were assessed and collected according to the terms of the statute in force at the time of the respective collections. The taxes were paid by the railroad company, and the amounts so paid were deducted by the company from the sums due and payable to the City of Louisville—that is to say before paying over dividends, the taxes were taken out, and the city received the dividends diminished by the amount of the taxes so paid, and its revenues were lessened to that extent."

[The italics are ours.]

It is therefore an undoubted fact that the $17,714.89 allowed by Commissioner Mason to the City of Louisville in 1891 and the $5,864.21 allowed by Commissioner Miller in 1893 were on account of taxes assessed upon the surplus belonging to the city and county respectively, which was set apart for and went into the stock dividend. The language of the court is explicit upon this point when it declares that "there was also a large amount of undistributed surplus belonging to the city upon which stock or scrip dividends were issued to the city. These cash dividends and the undistributed surplus which was converted into stock or scrip dividends were held by the officers of the government to be subject to taxation, *and taxes were assessed and collected* according to the terms of the statute in force at the time of the respective collections."

The stock dividend and the surplus out of which it was created are one and the same. This fund was directly set apart for the stockholders. If was not retained by the company, but was distributed as a dividend and the railroad company in paying the tax on the fund so set apart acted as the agent of the stockholders.

The court in its finding of facts declares that this surplus *belonged to the City of Louisville.* This being so, the share going to Logan County belonged to Logan County in the same way. The transaction by which the 40 per cent. dividend was declared applied to all the stockholders alike.

The court has incorporated into its findings of fact a copy of a return made by the railroad company, and it is given as an example of the manner in which the business was transacted. The returns were *all* in the same form, and these returns were required to be made whether they related to cash or stock dividends. The following is the example given:

Capital.	Net gains since prior dividend.	Rate of dividend declared.	Amount of dividend declared.	95 per cent of dividend, being the whole amount paid to stockholders, etc.	5 per cent of dividend retained as excise tax.
$5,527,870 63	$1,718,068 01	4 per cent tax.	$232,752 44	$221,114 82	$11,637 62
Profits over dividend declared, $1,485,315.57, 5 per cent. of which is...					$74,265 78

If the foregoing table exhibits the true state of the case it proves the correctness of our position. The third column gives the rate of dividend *and* tax. The fourth column gives the amount of the dividend declared, which includes the tax. The fifth column shows that only 95

per cent. of the dividend so declared was paid to the stockholders; and the sixth column shows that 5 per cent. of this dividend was paid to the Government. The whole dividend is made up of the two parts. Logan County received only 95 per cent. of the dividend which belonged to it.

Now, turning to the act of 1893, we can see how perfectly it applies to this condition of things. The act declares that the taxes are to be refunded "to the extent that such taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded." The table shows that 5 per cent. was deducted; and, it having been illegally done and the money having been paid over to the Government, we now bring suit to recover it back. The whole dividend was ours, and we received only 95 per cent. of it.

2. *But, even if counsel are technically right in their contention as to the time when the tax was taken out, it would make no difference in the legal effect of the transaction.*

The tax on cash and stock dividends stand in the same relation to the law, and in both cases the corporation is simply the convenient Government tax-gatherer.

As to both kinds of dividends, the railroad is made responsible both as to "returns" and "collections." In both of them the tax was five per cent. on the "amount of all such dividends." In both of them the payment was definitely fixed for the exact day "whenever the same shall be payable." The practice was, as has been frequently set forth, for the railroad, whenever it proposed to declare a stock dividend, to set apart a certain amount out of their net earnings, which amount included the five per cent. tax. After deducting the tax from the amount set apart, the balance was distributed into a stock

dividend. The stockholder and not the railroad suffered the diminution. The damage was not remote and consequential, but direct and immediate. The whole philosophy of the eight sections, from 116 to 123, inclusive, under the head of "Income," is consistent only with this view.

We are not left in doubt on this question. The statute itself settles it in favor of the injured party and declares in almost so many words that the tax, whether taken out before or after the declaration of the dividend, is one and the same. The tax of $5,864.21 was collected under the provisions of the act of 1864, and particularly under sections 116 to 123, inclusive. (13 Stat., 284).

Section 122 provides that "any railroad company * * * that may have declared any dividend in scrip or money * * * as a part of the earnings, profits, income or gains of such company shall be subject to and pay a duty of five per centum on the amount of all such * * * dividends * * * whenever the same shall be payable." Duty to be "paid to the Commissioner of Internal Revenue within thirty days after the time when said * * * dividends become due and payable." In this case the above duty was due and payable within thirty days after stock dividend declared. The stock dividend by its express term covered the surplus that had accumulated. The law plainly required every stock dividend to pay the five per cent. tax. Who paid it and how was it paid?

Section 121 answers the question. It contains the following proviso:

"Provided that when any dividend is made which includes any part of the surplus or contingent fund of any bank, trust company, company savings institution, insurance or *railroad* company, which has been assessed and the duty paid thereon, the amount of duty so paid on that

portion of the surplus or contingent fund may be deducted from the duty on such dividend."

Applying the above to the admitted facts we find: On the declaration of the Louisville and Nashville Railroad stock dividend of forty per cent. in 1867 a tax of five per cent. was apparently due the Government from every stockholder, including the County of Logan. From the surplus upon which this stock dividend was based the five per cent. had already been deducted (*i. e.*, the stock dividend in the words of the law "included a part of the surplus which had been assessed with the duty paid thereon"). Therefore when that dividend was made the amount of duty so paid on that portion of the surplus may be deducted from the duty on such dividend. As to these stockholders who were legally chargeable with such duty on the stock dividend this was the end of the matter, as the deduction and the tax were equal, but as to Logan County, which was not liable for said tax, the deduction thus allowed should have been paid to it and not retained by the Government, and the Government has to-day $5,864.21 of Logan County's money.

In other words, the Louisville and Nashville Railroad had a surplus, and it proposed to and did convert this surplus into a stock or scrip dividend. That dividend was subject to an assessment of five per cent. But no tax was assessed or collected for the reason that it had already been taken out of the surplus on which the dividend was declared. That is to say, a tax taken out before the dividend is declared is considered and held to be the exact equivalent of a tax upon the dividend itself after it is declared. They are in the eye of the law one and the same. The County of Logan, as a stockholder, was entitled to its share of the surplus funds of the company which were set apart for the dividend, either in money or

scrip without any illegal deductions or charges. If the tax was illegal, then the Government obtained money which belonged to Logan County, and the county has a right to demand that it be paid back. If, as the law declares, the payment of the tax before the declaration of the dividend is the same as and takes the place of payment after the declaration of the dividend, then the tax on the surplus is a tax on the dividend itself; so that whichever way you view it, the result is the same and the ground for relief the same.

3. The claim that the surplus had never been taxed not justified by the record.

Counsel for the Government in their attempt to answer the point raised upon the proviso contained in section 121, seem to claim that the surplus which was the basis of the stock dividend, never was assessed for taxation and never paid any tax, and that, therefore, the proviso has no application to the case in hand. They say on page 50 of their brief:

"Before there could be any deduction, however, the stock dividend must first have been returned for taxation, which the record does not show to have been done, either in 1867, when the stock dividend was declared, or in 1868, when the appellees received their new shares, or at any other time. This stock *dividend never was returned and never was taxed*, and the proviso in section 121 never operated upon it at all."

Thus the impression is sought to be made, that the surplus which entered into the stock dividend was never taxed, for if it was, it would be brought immediately under the terms of the proviso. Here it is well to refer to the record. That the surplus out of which the stock dividend was created, was assessed and the tax collected upon it, is shown by Commissioner Mason when in his letter

to the Secretary under date of January 4, 1891, he declares that the $17,712.89 "was collected as a tax on surplus profits, which were set apart as the basis of a stock dividend"; it is shown in the answer thereto by Secretary Windom in which he endorses and approves Commissioner Mason's statement; it is shown by the letter of acting Commissioner Wilson, to Secretary Carlisle of September 28, 1893, wherein he declares that "the tax claim was collected on the dividends and the *surplus afterwards converted into dividends* on stocks held by Logan County, and that the total amount withheld from said county on account of tax on dividends on stock is found to be $9,533.54 and *the total share of taxes on surplus, borne by said county, is found to be $5,864.21*"; it is shown by the answer of acting Secretary Hamlin when he speaks of said sum of $5,864.21 as "*the tax on the surplus afterwards converted into dividends*"; it is shown in the first finding of fact made by the court in the case of Louisville *v.* United States, where it declares that "under the internal revenue laws during that period, said company paid taxes to the United States upon its gross receipts, *its undistributed surplus*, the interest payable on its bonds and its cash dividends," and in its fifth finding of fact in case of Logan County *v.* United States, when it declares, "there was also a large amount of undistributed surplus belonging to the city, upon which stock or scrip dividends were issued to the city, and that this undistributed surplus which was converted into stock dividends, was held to be subject to taxation, and taxes were assessed and collected and taken out of the sums due and payable to the city."

All these proofs and many others that might be furnished, show that the surplus out of which the stock dividend of 1867 arose, was assessed and the tax collected, and every dollar which went into the stock dividends had borne its tax burden, and it was clearly intended by

the proviso of section 121, that having borne the tax once it should not be compelled to bear it again. The dividend, whether in money or stock, issued to Logan County, was, in the language of the court's finding, "lessened to that extent." That was the exact measure of the county's loss, and to the extent that the tax imposed and collected was illegal to that extent the county is entitled to recover.

Is it possible that all these public officers, and even the court itself, were mistaken? They were specially charged with the duty of ascertaining the facts, and they all agree that the portion of the surplus belonging to Louisville and Logan County, and out of which the stock dividend was created, *did* bear its five per cent. tax, and that the revenues of the city and county were diminished to that amount.

III.

The history of the passage of the acts of 1890 and 1893 shows that Congress intended to grant relief for taxes paid on account of stock dividends.

Two dividends were declared. The first was a cash dividend. As to the taxes paid or deducted from this, there is no controversy. They were paid by the railroad company and were taken out of the amount going to the county. The second dividend was the one declared in 1867, and which we call the stock dividend or undistributed surplus, for the reason that it consisted in the issue of forty per cent. increase of stock, based upon the surplus set apart for that purpose. Congress clearly had in mind this last transaction when it passed the acts of 1890 and 1893. There was no other stock dividend to which it could refer.

While the first bill in 1890 was pending, and before its passage, both the House and Senate were expressly informed of the exact nature of the transaction. The bill was introduced in the House and referred to the Committee on Claims. Mr. Burton made a report in favor of its passage. The following paragraph is contained in his report:

"The City of Louisville owned stock in the Louisville and Nashville Railroad upon which dividends were declared from time to time. Under the internal revenue laws a tax of 5 per cent. was for several years levied upon these dividends. This tax was not collected directly of the city, but of the railroad company, and *the dividends, less the tax, were paid by the company to the city.* This act of the railroad was without the knowledge or consent of the city."

In the Senate the bill was also referred to the Committee on Claims. Mr. Faulkner made the report of the committee. The report included a letter from the Acting Commissioner of Internal Revenue explaining the facts, and a letter from the United States Attorney for the District of Kentucky in regard to a judgment just rendered in that district. In the judgment of the court, the taxes in controversy were spoken of as "upon other stock issued to said county by said railroad company for dividends *which were paid by and in the stock so issued to said county.*"

In the body of Mr. Faulkner's report is the following:

"First. The evidence is clear that the railroad company, without notice to the sinking fund commissioners, *deducted from the amount of the dividends to which they were entitled the tax, which it paid over to the Government, and no notice of this was given to the city,* and no knowledge of the fact of this payment existed until some months after the bar of the statute attached."

Thus the attention of both houses of Congress was expressly called to the exact character of the claim made and the fact that the taxes sought to be refunded were taken from the fund upon which the dividends were based, or as Senator Faulkner expresses it, were "deducted from the amount of the dividends to which they were entitled.

The act of 1893 was passed under like conditions. It provided for the refuuding of taxes paid on interest and dividends in the case of the city of Louisville and the counties of Logan, Hart and Hardin, in Kentucky, and Sumner and Davidson, in Tennessee. In the cases of Sumner and Davidson the tax upon the cash dividend had already been paid and there remained nothing save the tax on stock dividends. This fact was called particularly to the attention of Congress. Mr. Cox reported the bill to the House. In the course of his report he says:

"The city of Louisville owned stock in the Louisville and Nashville Railroad upon which dividends were declared from time to time. Under the internal revenue laws a tax of five per cent. was for several years levied upon these dividends. The tax was not collected directly of the city but of the railroad company, and *the dividends less the tax* were paid by the company to the city."

In the Senate, Mr. Mitchell for Mr. Daniels, made the report. The following is an extract from it:

"The Counties of Sumner and Davidson made their appeal within the time required, but by some error or mistake of the department they were allowed only their tax on *money* dividends. *Their claim now is for the tax on stock dividends.*"

Congress was not left in the dark. It passed these bills

with a full understanding that the tax on stock dividends or on distributed surplus was to be refunded.

(See proceedings of Senate, February 1, 1893.)

The tax paid by the railroad company on account of the stock dividend was unconstitutional.

It has all along been conceded that as to counties and cities the tax was illegal, but by the decision recently rendered by the Supreme Court of the United States in case of Pollock *v.* Farmers' Loan and Trust Company, 158 U. S. R., 601, the collection of the tax was declared unconstitutional, whether paid out as the money of the railroad company or the County of Logan. It was a tax on incomes.

All the proceeds and profits arising from the operations of the road were held by the company in trust for the stockholders, subject only to the payment of operating expenses, interest and other necessary charges, and when the company held its meeting and finding that it had a large surplus on hand and decided to set that surplus apart to be converted into stock for the benefit of its stockholders, it was a practical severance of the fund from the bulk of the profits. If it paid tax upon this surplus then it paid an illegal tax, whether assessed upon the funds as the property of the road or the property of the stockholder. The stockholder is the injured party. He receives the dividend diminished by the amount of the tax. The Government has obtained a certain amount of money which rightfully belongs to him. Being the party in interest he may recover it back, and so it is with the County of Logan in the case under consideration.

We therefore respectfully submit—

First. That the findings and award made by the Commissioner of Internal Revenue and Secretary of the Treasury were final and not subject to review by the Comptroller or the courts except upon the ground of fraud or mistake, and neither of these exists.

Second. The judgment of the Commissioner and Secretary was in accordance with facts, law and equity.

Third. The history of the legislation shows that Congress intended a refunding of the tax on stock dividends.

Fourth. The tax sought to be recovered was unconstitutional, whether levied upon the railroad company or the county. The county has sustained the loss and is the real party in interest, and as such has the right to sue and recover it back.

We pray that the judgment of the Court of Claims may be reversed and proper relief granted.

ALPHONSO HART,
Attorney for Appellant.

FONTAINE T. FOX,
of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 167.

THE COMMISSIONERS OF THE SINKING FUND OF LOGAN COUNTY AND THE COUNTY OF LOGAN, KENTUCKY, *Appellants,*

v.

THE UNITED STATES.

Appellants' Brief in Reply.

As to the facts in the Case.

There is a difference between the counsel for the government and ourselves as to the facts in this case. Fortunately the Court of Claims has made certain findings which are reasonably clear and explicit. Some things may have been omitted which the parties might desire should be stated; but enough is furnished to enable the court to form an intelligent opinion and draw the proper legal conclusions.

The counsel for appellees seem not to be satisfied with the record. They charge the court below with having introduced into its findings of fact "irrelevant" matter —matter that has no business in the case. They contend (page 8) that all of the fifth finding should be disregarded. They also contend (page 9) that other parts of the find-

ing were inserted "through inadvertance." They further contend (page 10) that the court below "did not consider the language used as carefully" as it should have done. They also contend that still other portions of the finding of fact are mere conclusions of law. Having thus eliminated or attempted to eliminate from the case all the "irrelevant" matter—all the facts which were inserted "inadvertantly"—all the facts which are not properly stated and all the facts which are denominated conclusions of law, they proceed to give their interpretation of the parts which remain.

They deny that the "surplus" fund was ever distributed in the form of a stock dividend and charge (page 11) that "there is absolutely nothing in the record from one end to the other" to warrant that statement upon our part. They deny that the surplus was ever converted into a stock dividend at all, and they claim that if any stock dividend was ever issued to the City of Louisville and the County of Logan, it was not diminished by the taking out of any tax.

Upon these points we take issue with the learned counsel.

We assert—

That the surplus *was* converted into a stock dividend; that it was distributed to the stockholders in the form of a stock dividend; that the dividend included the tax and that the tax was taken out of the dividend by the company and the stock received by Louisville and Logan County was diminished to that extent.

However much the finding of fact may be criticised by the counsel for the government, we feel justified in assuming that the court below understood and performed its duty and that it intelligently and accurately stated the facts of the case. We shall therefore assume that they are correct and will rely solely upon what appears in the record.

1. Surplus—stock dividend and tax.

Our contention that the surplus was converted into a stock dividend, and that the tax was taken out of it, and that the stockholders received the stock diminished by the amount of the tax is supported by the Commissioner of Internal Revenue in his letter to the Secretary of the Treasury and by the Secretary of the Treasury in his letter approving the allowance of the claim (R., pp. 4 and 5). It is also established by the fifth finding of fact (page 9) made by the Court of Claims, wherein it is stated that the surplus was converted into a stock dividend and a tax assessed and collected upon it and it is also established by the second finding of fact (page 8), wherein the amount of the surplus, the amount of the tax and the amount of the dividend are fully set forth.

The Commissioner of the Internal Revenue and Secretary of the Treasury were the only persons authorized by Congress to adjudicate the claim and their findings of fact must be accepted as correct. And when as in the present case, the Commissioner and Secretary are corroborated and supported as to the facts, by the Court of Claims itself, there ought to be an end of controversy.

2. Form of tax return.

We incorporated in our brief (page 15) one of the returns made by the Louisville and Nashville Railroad Company to show that the dividend included the tax and that the stockholder received it diminished by the amount of the tax. The copy of the return is taken from the first finding of fact by the court (page 7).

The learned counsel for the government contend that the table given, refers to cash, and not to stock dividends.

The company was required to make returns both of its cash and stock dividends, and the form given applies to

both classes alike. It is furnished by the court as a sample and the court (page 7) expressly says:

"The following is *one* of the returns made by the railroad company and *all* were in substantially the same form."

That this form was used in the case of stock as well as cash dividends is clearly shown by the second and fifth findings of fact.

3. The forty per cent. stock dividend.

The forty per cent. stock dividend which was declared in 1867 included the five per cent. tax, and the City of Louisville and the County of Logan received only ninety-five per cent. of their share of that dividend—the other five per cent. being retained by the company to pay the tax. The tax was therefore "deducted" from the stock dividend and the transaction was brought within the letter and spirit of the act of 1893. The city and county received their stock diminished by the amount of the tax. This is shown by the last part of the second finding of fact (page 8) which reads as follows:

"At the time when the stock dividend was declared—November 16, 1867—the nominal or par value of the capital stock of the Louisville and Nashville Railroad Company was $5,638,600.

The surplus earnings of the road reported by the officers thereof to the Internal Revenue Department, prior to the year 1868, on which the road paid a tax of five per cent.—

Amounted in the aggregate to	$2,461,787 17
Tax paid thereon	123,089 36
	$2,338,697 81

The par value of the stock dividend in 1867 was $2,131,500."

It will be seen that the company had a surplus sufficient to warrant the declaration of a forty per cent. dividend and a little over. It declared the dividend.

A forty per cent. dividend on $5,638,600 amounted to $2,255,440.

This was the amount the stockholders would have received if there had been no tax. As a matter of fact, however, they received only $2,131,500. This is ninety-five per cent. of the amount of the dividend; the remainder being taken out for taxes.

In every instance the dividend declared included the tax, and the city of Louisville and the County of Logan as well as all the other stockholders received their stock diminished by the amount of the tax.

To avoid the force of this position counsel contend that more than five per cent. was reserved by the company. The only effect of this contention is to show that Logan County got even less than ninety-five per cent. of the dividend. However this may be, the undoubted purpose was to reserve from the dividend five per cent. for taxes. They did reserve at least that amount and the fact remains that the revenues of Logan County were diminished to that extent.

The forty per cent. issued to be paid in stock was just as much a dividend as though declared to be paid in cash, and when the act of 1893 directed the Commissioner and Secretary to refund the amount deducted from dividends, it clearly included the sums taken out of the stock dividends as well as those taken out of the cash dividends. They found that $5,864.21 had been deducted from the stock dividend due and payable to Logan County. The fact can not be questioned, and the county has the undoubted right to recover it back.

4. The Fifth Finding of Fact.

The fifth finding of fact emphasizes and fortifies our position and is very valuable in aiding us to arrive at the facts and the law of the case.

Counsel contend that this finding is irrelevant and has nothing to do with the present case, for the reason that the facts therein stated apply to case No. 105, The United States *v.* The City of Louisville. A little reflection will show that the fifth finding *does* apply to both cases.

The seventeen thousand dollar claim involved in the Louisville case arose out of the forty per cent. dividend declared in 1867. The five thousand dollar claim involved in the present case arose out of the same dividend. The facts are exactly the same in each case. By looking at the fourth finding of fact (page 9) it will be seen that the Logan County claim is particularly stated. And then, having done this, the court in its introduction to the fifth finding declares that "prior to the passage of the act of 25th of February, 1893, the following proceedings had taken place in the Treasury Department relative *to the same taxes paid by the same company.*" By this the court clearly intends to set forth that the case of Logan County in this respect is exactly like that of Louisville. Hence the importance and propriety of the finding.

We therefore submit that the Court of Claims for this and other reasons, committed error in refusing to render judgment for the amount of taxes which had been deducted from the stock dividend payable to Logan County.

ALPHONSO HART,
Attorney for Appellant.

FONTAINE T. FOX,
of Counsel.

UNITED STATES v. LOUISVILLE.[1]

APPEAL FROM THE COURT OF CLAIMS.

No. 105. Argued January 5, 6, 1898. — Decided February 21, 1898.

The act of March 3, 1891, c. 540, providing for the payment to the city of Louisville of the amount found due under the act of June 16, 1890, c. 424, was in the nature of a judgment, final in its character, and subject to no appeal, and the duties of the officers of the Government thereafter charged with the payment of the moneys appropriated by that act were not discretionary, and were limited to the clerical functions of making payment as directed by the act.

By the act of February 25, 1893, c. 165, making provision for the payment of further and other claims of the same character, Congress did not intend to in anywise open the transactions which had been closed by the payment of the moneys directed in the act of 1891.

This is an appeal from a judgment of the Court of Claims in favor of the city of Louisville, based upon a petition filed in that court for the recovery of seventeen thousand and some odd dollars, alleged to be due the city from the Government on account of taxes improperly collected.

It appears that between the years 1862 and 1872 the city of Louisville, Kentucky, owned a large amount of bonds and stock of the Louisville and Nashville Railroad Company, upon which the company paid interest and declared cash dividends, retaining, however, during most of the time an undistributed surplus. Under the internal revenue law, § 122, act of June 30, 1864, c. 173, 13 Stat. 223, 284, in force during this period, the company paid taxes to the United States upon its gross receipts, its undistributed surplus, the interest payable on its bonds, and its cash dividends. The taxes paid on interest and dividends were deducted from the amounts due as interest and dividends, so that the revenues of the city of Louisville accruing from these sources were diminished to the extent of such deductions;

[1] The docket title of this case is "The United States, Appellant, v. The Commissioners of the Sinking Fund of the City of Louisville, and the City of Louisville."

but these deductions were not known to the Commissioners of the Sinking Fund of the city until the time had expired for an application to the Government to be repaid the taxes so deducted.

In 1872, in the case of *United States* v. *Railroad Company*, 17 Wall. 322, this court decided that a tax under the above-named section 122 of the internal revenue act, upon the interest on bonds issued by a railroad company, was a tax upon the creditor and not upon the corporation paying it, and that a municipal corporation, being a portion of the sovereign power of a State, was not subject to taxation by Congress upon its municipal revenues.

The time for making application for repayment of the taxes thus illegally obtained having passed, Rev. Stat. §§ 3220, 3228, resort was had to Congress, which enacted the statute approved June 16, 1890, c. 424, 26 Stat. 157. The statute authorized and required the Secretary of the Treasury and the Commissioner of Internal Revenue "to audit and adjust the claim of the board of sinking fund commissioners of the city of Louisville, Kentucky, for internal revenue taxes on dividends on shares of stock owned by said board for said city of Louisville in the Louisville and Nashville Railroad Company, to the extent such taxes were deducted from any dividends due and payable to said board, and to pass upon said claim and render judgment thereon, in the same manner and with the same effect as if said claim had been presented and prosecuted within the time fixed and limited by law."

Pursuant to the provisions of this act, the city of Louisville presented to the proper officers of the Treasury Department its claim to recover taxes to the amount of $65,578.32, of which the officers allowed $42,514.03, the latter sum being made up, as stated, of two items, one of $24,801.14, taxes which had been deducted from cash dividends, and $17,712.89, taxes which had been deducted from surplus profits which, on the 17th of November, 1867, had been set apart by resolution of the board of directors of the railroad company as the basis of a stock dividend, which was directed to be distributed in February, 1868. The amount of $42,514.03, having been

audited and allowed, was reported by the Secretary of the Treasury to Congress for its action, there being no appropriation from which the money awarded the city could be paid.

Under the act of March 3, 1891, c. 540, being an appropriation to supply deficiencies, 26 Stat. 862, at 867, Congress provided as follows: "Payment to city of Louisville, Kentucky: For payment to the city of Louisville, Kentucky, the amount found due, under the act of Congress approved June 16, 1890, and reported to Congress in House Executive Document No. 260, of the present session, $42,514.03." The amount thus appropriated was duly paid to the city, as directed by Congress.

Subsequently another application was made to Congress, and that body passed the act approved February 25, 1893, 27 Stat. 477, a copy of which is set forth in the margin.[1]

Under this act the city of Louisville applied to the proper officers of the Government for a further refund of $34,667.80 on account of taxes claimed to have been illegally exacted. One item in this last-named claim, amounting to $3008.40,

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[1] "Chap. 165. An act for the benefit of the State of Kentucky, Logan and Simpson Counties, and of Louisville, Kentucky, and of Sumner and Davidson Counties, Tennessee.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, be, and he is hereby, authorized and required to audit and adjust the claims of the Sinking Fund Commissioners of the State of Kentucky, of Logan and Simpson Counties in said State, of the city of Louisville, Kentucky, and of Sumner and Davidson Counties, Tennessee, for internal revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said counties and city, respectively, in the Louisville and Nashville Railroad Company, and of said State for internal revenue taxes collected and interest on railroad bonds of the railroad from Louisville to Lexington and on dividends on stock of said railroads owned by said State, and due and payable to said Boards of Sinking Fund Commissioners, respectively, and to said State, counties and city, to the extent that such taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded, and for this purpose any statute of limitations to the contrary notwithstanding, sections nine hundred and eighty-nine, thirty-two hundred and twenty, thirty-two hundred and twenty-six, thirty-two hundred and twenty-seven, and thirty-two hun-

Counsel for Appellants.

the appellants insist was for taxes collected by the Government from the railroad company upon its undistributed surplus in 1868 and 1871, and that this item had been included in the claim presented in 1890, but had not been allowed because, as stated in the determination made by the Commissioner of Internal Revenue, the act of June 16, 1890, under which the application for refunding was made, limited an adjustment of the claim "to the extent that such taxes were deducted from any dividends due and payable, and did not direct the adjustment of the claim to the extent that taxes were deducted from interest or gross receipts."

The Acting Commissioner of Internal Revenue audited and adjusted the claim made under the act of 1893, at its full amount, and as incidental to such audit and adjustment he assumed to reëxamine the claim allowed in 1891. The result of such reëxamination of the latter claim was a reduction to the extent of $3548.89, which sum was deducted from the amount allowed under the act of 1893, reducing it to the sum of $31,359.02. When the claim reached the First Comptroller a further sum of $17,633.85 was deducted by him, which consisted principally of the amount allowed and paid in 1891 for taxes on surplus, which left a balance payable to the city of $13,725.17, for which sum the Comptroller directed a draft to be issued. To recover the amount thus deducted from the claim as audited and allowed under the act of 1893, the city of Louisville commenced this proceeding in the Court of Claims, which rendered judgment in its favor for the amount demanded. The Government brought the case here for review.

Mr. Charles C. Binney for appellants. *Mr. Assistant Attorney General Pradt* was on his brief.

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dred and twenty-eight of the United States Revised Statutes are hereby made applicable and available with the force and effect, as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts, when ascertained, as aforesaid and not heretofore refunded, shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year.

"Approved February 25, 1893."

Mr. Alphonso Hart for appellees. *Mr. Fontaine T. Fox* was on his brief.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

The claim here made is that the officers of the Government committed an error in auditing and allowing the amount paid in 1891 for taxes on surplus, as those taxes, it is said, were not referred to in the act of 1890 and should not have been reported to Congress or ordered paid by it, and that the power to review this action (if not previously existing) was created by the act of 1893, above set forth.

We think the judgment of the Court of Claims is right. By the payment under the act of 1891 the questions involved were ended. It was not only an auditing and allowance by the proper officers of the Treasury of a claim over which they had jurisdiction, but the amount was paid under the direct commandment of an act of Congress specifically appropriating the particular sum reported to it as due to the city of Louisville and for the payment of which the authority of Congress was needed.

Laying for a moment the act of 1893 out of view, it seems clear to us that there was no power on the part of the officers of the Treasury to reëxamine the correctness of the claim paid by virtue of the act of 1891, or to reverse that action on the ground that a mistake of law had been made in the decision reported to Congress upon which it passed the act last named. The officers who acted under the statute of 1890 (the Secretary of the Treasury and the Commissioner of Internal Revenue) performed their duties in examining, auditing and allowing the claim as they thought the facts and the law required. It was not the case of an allowance of an ordinary claim against the Government by an ordinary accounting officer, any more than was the case of *United States* v. *Kaufman*, 96 U. S. 567, 570, or that of *United States* v. *Savings Bank*, 104 U. S. 728. When the decision of these officials was by the Secretary of the Treasury reported to Congress and an appropriation made

by that body in 1891 of the specific sum mentioned in the report, with directions to pay the amount thus appropriated to the city of Louisville, the time for examination had passed, and it was the duty of the proper officers of the Government to pay the money as directed by the statute.

We also think the subsequent statute of 1893 gave no right to the Treasury officers to interfere with or in any manner to review the action of the Government under the statutes of 1890 and 1891. It may be true that a small portion of the claim made by the city under the act of 1893 had theretofore been made under the act of 1890, but that portion had then been rejected and, of course, never audited, allowed or paid. Because a small sum which had once been rejected was included in the principal claim made by the city in 1893, no sort of foundation was thereby laid for the assertion of a right on the part of the Government to review and, in substance, reverse the prior action of the Treasury Department in allowing a claim which had been thereafter affirmed by Congress with a substantial direction to pay the amount thereof, and which had been paid accordingly.

The authority given by the act of 1893 required the officers therein named to audit and adjust the claims of the city of Louisville for internal revenue taxes to the extent that such taxes were deducted from any dividends or interest due and payable to the city *and which had not been theretofore refunded*, and for this purpose the statute of limitations was repealed and certain sections of the Revised Statutes were made applicable, and the amounts, when ascertained and not theretofore refunded, were directed to be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year (1893). We think this provision gave no jurisdiction to interfere with or to review the action of the Treasury officials under the act of 1890, or the action of Congress in enacting the statute of 1891.

The act of 1891 was in the nature of a judgment, final in its character, and subject to no appeal, and the duties of the officers of the Government thereafter charged with the payment of the moneys appropriated by that act were not discretionary,

Counsel for Parties.

and were limited to the clerical functions of making payment, as directed by the act. *United States* v. *Jordan*, 113 U. S. 418. It cannot be possible that Congress had the least intention, when making provision for the payment of other and further claims of the same character, to in anywise open the transactions which had been closed by the payment of the moneys directed by the act of 1891. We have no doubt whatever that if Congress had any such intention it would have made it clear by the use of far different language from that which is contained in the act of 1893. It would have said, in so many words, that, in proceeding under the statute of 1893, the officers named therein should examine into the correctness of the decisions arrived at in 1890 and 1891.

The judgment of the Court of Claims was right, and it should, therefore, be

Affirmed.

LOGAN COUNTY *v.* UNITED STATES.[1]

APPEAL FROM THE COURT OF CLAIMS.

No. 167. Argued January 5, 6, 1898. — Decided February 21, 1898.

Where a railroad company pays a tax on its undistributed surplus under the internal revenue act of June 30, 1864, c. 173, 13 Stat. 223, it is thereby paying a tax upon its own property, and such payment cannot be regarded as a payment of a tax upon a stock dividend thereafter declared by the company.

THE case is stated in the opinion.

Mr. Charles C. Binney for appellants. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. Alphonso Hart for appellees. *Mr. Fontaine T. Fox* was on his brief.

[1] The docket title of this case is "The Commissioners of the Sinking Fund of Logan County and the County of Logan, Kentucky, Appellants, *v.* The United States."

Opinion of the Court.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This application was made to recover taxes heretofore paid, and, like the one in the preceding case, it is based upon the statement that the tax could not be imposed as against the county of Logan, because it was a municipal corporation, and not subject to taxation by Congress upon its municipal revenues. *United States* v. *Railroad Company*, 17 Wall. 322. Therefore, if it appear that the railroad company has deducted from the dividend due the county the amount of any tax paid to the Government on a stock dividend issued by the company, the appellants are entitled to recover. The facts are quite simple.

On the 14th of March, 1894, the appellants filed their petition in the Court of Claims for the refunding of taxes which they claimed to be entitled to under the act of February 25, 1893, c. 165, 27 Stat. 477. The act is set out in full in the margin in the preceding case of *United States* v. *City of Louisville*, *ante*, p. 249. The claim made herein was for internal revenue taxes alleged to have been illegally assessed, and amounting to the sum of $17,606.14. Under the provisions of the statute above cited the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, audited and adjusted this claim at the sum of $15,397.75, and in due course of procedure it came to the Comptroller of the Treasury, who directed a warrant to issue for the sum of but $9533.54 (the total amount withheld from the county on account of taxes on cash dividends), and he refused to include in the warrant the sum of $5864.21, being the balance of the $15,397.75 which had been audited and adjusted as above mentioned, because, as the Comptroller held, the claim for taxes paid on account of stock dividends was illegal and unauthorized, and this suit is brought to recover the sum which was rejected by the Comptroller, and which he refused to pay. The Court of Claims gave judgment in favor of the Government and dismissed the petition of claimants, who have appealed to this court from the judgment of dismissal.

The point first made by the counsel for the claimants is

that the audit and adjustment made by the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury, under the act of Congress of 25th of February, 1893, was an award having all the force of a judgment which could not be questioned either by the Comptroller of the Treasury or by the courts, except for fraud or mistake. The cases of *United States* v. *Kaufman*, 96 U. S. 567, and *United States* v. *Savings Bank*, 104 U. S. 728, are cited for the purpose of showing the conclusiveness of the action of the officers above named.

All that those cases hold is, that where in a case somewhat similar to this the claim had been allowed by the officers named in the statute, "the allowance may be used as the basis of an action against the United States in the Court of Claims, where it will be *prima facie* evidence of the amount that is due, and put on the Government the burden of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the department declined to do what the law or Treasury regulations required of him before payment could be obtained. The fact of fraud or mistake must be established by competent evidence, the same as any other fact in issue. An allowance by the commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress." *United States* v. *Savings Bank*, 104 U. S. 728, at 733. The question of the conclusiveness of the action of the officers of the Government under their general powers is also referred to in *Wisconsin Central Railroad* v. *United States*, 164 U. S. 190, and it is there held that the Government is not bound by the act of its officers in making an unauthorized payment under misconstruction of the law. However, the act of the Commissioner of Internal Revenue and the Secretary of the Treasury in approving the claim may be assumed to be *prima facie* evidence that the amount so approved by them was due the claimant from the Government, and the burden therefore rested upon the Government of showing that the allowance of

the amount claimed in this proceeding was made through a mistake on the part of those officials. Unless this mistake is made apparent by the findings of the court below, its judgment in refusing to give effect to the allowance of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury, might have to be reversed. If, however, the findings show that those officials did make a mistake in allowing that portion of the claim made which is now in suit, the judgment of the court below, so far as this point is concerned, must be affirmed.

The defence made by the Government upon the merits is based on the provisions of the statute of 1893, and upon the allegations that the findings of the court below substantially show there were no taxes paid upon any stock dividends declared in 1867 or 1868. It is added that the claim on the part of the county of Logan was not in reality for any taxes actually paid on "dividends in scrip" or "stock dividends" issued to appellants, but that it was for a certain proportion of the taxes paid by the railroad company on that part of its profits which were not distributed in dividends, and which in fact constituted what the internal revenue acts of 1864 and 1866 called "profits carried to the account of any fund or used for construction," and which funds were taxable under those acts, as the property of the corporation.

Counsel insists that a tax upon undistributed profits in the treasury or belonging to the corporation is like a tax on gross earnings, a tax on the corporation on account of its own property, and not to be thereafter recovered by this claimant, either under the act of 1893 or under those sections of the United States Revised Statutes therein alluded to.

It must be remembered that the Court of Claims under the act of 1893 was simply given jurisdiction to examine a claim which was otherwise barred by the statute of limitations. The act gave no other right and created no claim against the Government not otherwise existing. The right of recovery for an illegal tax had been provided for by the Revised Statutes of the United States, section 3220, and that remedy could have been pursued for two years after the payment of

any such tax. Rev. Stat. § 3228. In this case the time thus limited had expired, and the act of 1893 was passed for the purpose of setting aside the bar of the then existing statute. The right to demand the refunding of the money in dispute must depend therefore upon the question whether any tax on a stock dividend had been collected from the company by the Government, and a proportionate amount thereof deducted by the company from the dividend otherwise due the county. No deduction of any tax from the scrip dividend due to the claimant was ever made in terms. It is sought to be inferred from the fact that a prior payment of a tax by the company on its undistributed surplus had thereby diminished that fund by the amount of the tax, and that a stock dividend must be assumed to represent profits not distributed in cash dividends, and that the claimant would have received more stock if the profits had not been diminished by the payment of the tax from which it is said a municipal corporation was exempt under the decision of the Supreme Court in the case of *Wisconsin Central Railroad* v. *United States*, above cited. Of course, the payment of the tax diminished the profits of the company by just that amount. But, at the time when it was paid, the full amount thereof was due the Government from the company itself, and not one penny could properly have been deducted from the amount of the tax by reason of the fact that a municipal corporation owned a certain amount of the stock of the company. All taxes which were levied on the property of the company were payable in their full amount by the company, and not a dollar could be legally deducted from such tax on account of the character of any owners of its stock. Consequently, when a stock dividend is declared, the fact that the directors might have chosen to declare a larger one if it had not been for the payment of the taxes the company had made on its own property, is entirely immaterial. So is the fact, if it be a fact, that the total stock dividend was reduced by the amount which the company had theretofore paid as a tax upon its undistributed surplus.

There is no finding of the court below which in terms shows that the tax in question here was ever paid on a "stock" or

"scrip" dividend. All that appears is that a stock dividend of forty per cent on its capital was declared by the railroad company by a resolution adopted on the 16th of November, 1867, which provided that the stock should be issued on February 10, 1868.

The court below did find that prior to the passage of the act of February 25, 1893, certain proceedings had theretofore taken place in the Treasury Department relative to the same taxes paid by the same railroad company. (The court in this finding referred to the proceedings in regard to the claim made by the city of Louisville for a return of taxes, under the circumstances detailed in that case, just decided, *ante*, p. 249, and which are therein set forth.)

The court then set forth in this case the finding made in the *Louisville case*, and in that case, after speaking of the fact that cash dividends had been declared upon the stock of the railroad company, and that there existed a large amount of undistributed surplus in the treasury of the railroad company, the finding continued: "These cash dividends and the undistributed surplus which was converted into stock or scrip dividends were held by the officers of the Government to be subject to taxation, and taxes were assessed and collected according to the terms of the statute in force at the time of the respective collections."

Taking all the facts as found by the court below, it appears that the only tax paid was paid on the undistributed surplus of the company while it remained such surplus in its hands and while it was a portion of its own property, as much so as anything else owned by it, and that thereafter the company declared a stock dividend of forty per cent upon its old capital.

By the provisions of the internal revenue act of 1864, section 122, a stock dividend was subject to a tax of five per cent. So far as material the section provides: "That any railroad . . . that may have declared any dividend in scrip, or money due or payable to its stockholders, as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund,

or used for construction, shall be subject to and pay a duty of five per centum on the amount of all such interest, or coupons, dividends or profits, whenever the same shall be payable; and said companies are hereby authorized to deduct and withhold from all payments, on account of any interest, or coupons and dividends due and payable as aforesaid, the duty of five per centum," etc.

Under this plain provision of the statute it is perfectly clear that the stock dividend in question was a proper subject of taxation. But, as already mentioned, there is no finding that any such tax has been paid, and, of course, none that any deduction on its account was ever made from any dividend due the county. On the contrary, from the findings that have been made, it appears that the only tax which has been paid was paid by the railroad company upon its undistributed surplus at a time when such fund was its own absolute property. That fact, taken in connection with the declaration of the dividend of forty per cent upon the amount of the capital of the railroad company, does not show a payment of the tax on the stock dividend declared under the resolution mentioned.

It is plain that this surplus fund, which, at the time it was taxed, belonged to the company, was not distributed to the stockholders, nor was it converted into stock by reason of the stock dividend. If it had been a cash dividend sufficiently large in amount to cover the surplus, then the payment of the dividend would have affected the distribution of the fund. But no distribution could take place by any stock dividend. Such a dividend distributed nothing but stock, which made the stockholder neither richer nor poorer than he was before it was issued.

Although the court finds that the undistributed surplus of the railroad company was held by the officers of the Government to be subject to taxation, and taxes were assessed and collected according to the terms of the statute in force at the time of the respective collections, yet such fact does not advance us a step in the direction of showing that any duties were paid on the stock dividend. The tax or duties had been

paid by the company on a fund which then belonged to it. Unless payment of the tax on this undistributed surplus was in substance a payment of the five per cent tax on the stock dividend, then there is no finding that any such payment was ever made. That payment cannot be so regarded because the tax on the undistributed surplus was a tax upon the property of the company and was paid as such by the company, and if the amount thereof were deducted by the company from its subsequent stock dividend, that would be an act of the company, and would not render the prior payment of the tax on the undistributed surplus improper even with regard to Logan County. Otherwise all payments of taxes made by a company upon its own property would be subject to a deduction proportioned to the amount of its stock held by States or other corporations of a municipal character. The adoption of the resolution for a stock dividend, together with the issue of the stock, could have absolutely no effect upon the undistributed surplus fund, so far as any distribution thereof was concerned. The shareholder got no more interest in or right to that fund than he had before, and the prior payment of the tax upon it did not thereby decrease the amount of the forty per cent dividend upon the old capital by a penny. And yet it is only upon the payment of the tax which the company made on its property, in the shape of its undistributed surplus, that the claimants can by this record found their claim to recover their proportion of such tax. If allowed, then the claimant could, upon the same reasoning, recover its proportion of every tax paid by the company upon any other of its property, unless the statute of limitations applied. If the company in fact reduced its stock dividend by the amount of the tax which it had previously paid on the surplus fund belonging to it, such fact gives no support to the claim of the county to recover from the Government an amount of a perfectly legal tax. And as before stated, the proof really is that there was no other payment of a tax than one upon the surplus as the property of the company.

An effort is made to show that this payment of a duty or tax on the undistributed fund might be treated as a payment

of such duty or tax on the stock dividend, under the proviso contained in section 121 of the statute of 1864, which reads: "*Provided*, That when any dividend is made which includes any part of the surplus or contingent fund of any . . . railroad company, which has been assessed and the duty paid thereon, the amount of duty so paid on that portion of the surplus or contingent fund may be deducted from the duty on such dividend."

It is perfectly apparent that this proviso includes only cash dividends. It is a dividend which is to include for distribution any part of the surplus or contingent fund of a railroad or other company. How can a stock dividend distribute a fund? As already remarked, a stock dividend distributes nothing but stock. Hence, there is no sense in applying the statute to a case where no distribution of a fund is made and where the fact of a double payment on the fund cannot arise. The proviso clearly refers to a case where a surplus has already paid duty and where subsequently to that time it is distributed to the shareholders. Under such circumstances that portion of the dividend which has thus once paid its duty of five per cent is not to be taxed again when distributed to the shareholders. But so long as there is no distribution, the tax paid on the surplus as surplus and which belonged to the corporation when the tax was paid, is not to be credited on or deducted from a subsequent tax upon a stock dividend which does not distribute the surplus nor in any manner change its ownership.

We agree, therefore, with the opinion of the court below, and we hold that where a railroad company pays a tax on its undistributed surplus under the act of 1864, it is thereby paying a tax upon its own property, and that such payment cannot be regarded as a payment of the tax upon a stock dividend thereafter declared by the railroad company.

The judgment of the Court of Claims should, therefore, be

Affirmed.